Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

ELMAR LEE PETTIT, NORTH BAY PLUMBING, INC.; and NOR-CAL PLUMBING, INC.

Petitioners,

v.

BAY AREA PIPE TRADES PENSION TRUST FUND; BAY AREA PIPE TRADES HEALTH & WELFARE TRUST FUND; U.A. LOCAL NO. 343 HEALTH & WELFARE TRUST FUND; U.A. LOCAL NO. 343 PENSION TRUST FUND; NORTHERN CALIFORNIA PIPE TRADES HEALTH & WELFARE TRUST FUND; NORTHERN CALIFORNIA PIPE TRADES PENSION TRUST FUND; and U.A. LOCAL 343 JOURNEYMAN AND APPRENTICE TRAINING TRUST FUND

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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107 pp

QUESTIONS PRESENTED

1. Whether a Federal district court has jurisdiction under Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), over a claim by trust funds against individuals who are not personally parties to a labor contract but who are sued by the trust funds for delinquent pension-plan contributions on the ground that "a body of federal common-law" controls when the corporate veil of a corporation that signs a labor contract should be pierced.

2. Whether a federal action to collect delinquent pension-plan contributions may be initiated only by the parties specifically enumerated in the Employment Retirement Income Security Act ("ERISA") – *i.e.*, participants, beneficiaries or fiduciaries.

3. Whether a court of appeals may choose to make a portion of its decision in a single appeal "citable" and permit its publication and make another portion of its decision on the same appeal "non-citable" and unpublished.

PARTIES TO THE PROCEEDING

The caption sets forth all parties to the proceeding with the exception of Audrey Jean Pettit who prevailed in the court below and is not, therefore, a petitioner. Petitioners Nor-Cal Plumbing, Inc., and North Bay Plumbing, Inc., are privately held, have no parent companies, and have no wholly or partially owned subsidiaries.

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OPINIONS BELOW

The published and citable opinion of the court of appeals on the issue of subject-matter jurisdiction (Pet. App. A, pp. 1a – 13a, *infra*) is reported at 185 F.3d 978. The court's unpublished and non-citable memorandum decision disposing of all other issues (Pet. App. B, pp. 14a – 37a, *infra*) is not reported. An earlier opinion of the district court granting summary judgment (Pet. App. E, pp. 41a – 52a, *infra*) is reported at 797 F. Supp. 767. An earlier opinion of the court of appeals (Pet. App. F. pp. 53a – 72a, *infra*) reversing summary judgment is reported at 48 F.3d 1465.

JURISDICTION

The court of appeals' decision was issued on July 27, 1999. A timely petition for rehearing was denied on September 7, 1999 (Pet. App. C, pp. 38a – 39a, *infra*). A timely motion to publish the unpublished opinion was denied on October 14, 1999 (Pet. App. D, p. 40a, *infra.*). The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS AND LOCAL RULES INVOLVED

Section 301(a) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 502(d)(1) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(d)(1), provides in relevant part:

> An employee benefit plan may sue or be sued under this subchapter as an entity.

Section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1), provides in relevant part:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary . . . .

Section 502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2), provides in relevant part:

> In an action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan . . ..

Section 515 of ERISA, 29 U.S.C. § 1145, provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

The Ninth Circuit has adopted Circuit Rule 36 which provides, *inter alia*, as follows:

Circuit Rule 36-1: Opinions, Memoranda, Orders; Publication

> Each written disposition of a matter before this Court *shall bear* under the number in the caption the designation OPINION, or MEMORANDUM, or ORDER. A written, reasoned disposition of a case or motion which is designated as an opinion under Circuit Rule 36-2 is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written, reasoned disposition of a case or a motion which is not intended for publication

under Circuit Rule 36-2 is a MEMORANDUM. Any other disposition of a matter before the court is an ORDER. A memorandum or order shall not identify its author, nor shall it be designated "Per Curiam."

All opinions are published; no memoranda are published; orders are not published except by order of the court. As used in this rule, the term PUBLICATION means to make a disposition available to legal publishing companies to be reported and cited. (Emphasis added).

Circuit Rule 36-2: Criteria For Publication

A written, reasoned disposition shall be designated as an OPINION only if it:

(a) Establishes, alters, modifies or clarifies a rule of law, or

(b) Calls attention to a rule of law which appears to have been generally overlooked, or

(c) Criticizes existing law; or

(d) Involves a legal or factual issue of unique interest or substantial public importance, or

(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary

for clarifying the panel's disposition of the case, or

(f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or

(g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

Circuit Rule 36-3: Other Dispositions

Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

STATEMENT

1. The Pettits Start Their Businesses.

Elmar Lee Pettit purchased Nor-Cal Plumbing, Inc. ("Nor-Cal"), a small plumbing contract business located in Fairfield, California, in the early 1960's (E.R. 13; C.R. 474).[1] He built it up by 1987 to a company employing 30

[1] "E.R." refers to the Excerpts of Record filed in the court of appeals. "C.R." refers to the Clerk's Record in the court of appeals.

men, with gross revenues exceeding $2.5 million (C.R. 707). During the full time that Mr. Pettit owned and operated Nor-Cal, it was a party to a collective bargaining agreement with Local 343 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("Local 343"), under which it was required to make contributions-to the respondents, which are various trust funds covered by The Employee Retirement Income Security Act of 1974 ("ERISA"). Nor-Cal made the required contributions for its own employees (C.R. 474).

In 1981, Mr. Pettit's wife, Audrey Jean Pettit, incorporated North Bay Plumbing, Inc. ("North Bay"). North Bay also was located in Fairfield, and it operated a plumbing contracting business, but it never signed a collective bargaining agreement. Consequently, no contributions were made to the respondents on behalf of North Bay's employees (E.R. 3-5; C.R. 474). For a period of six years – between 1981 and 1987 – both Nor-Cal and North Bay operated concurrently. During this time, Nor-Cal's business grew (C.R. 707).

2. A Lawsuit Is Initiated.

In May 1987, the trust funds (respondents in this Court) and Local 343 filed an action against Nor-Cal, North Bay and the Pettits in the United States District Court for the Northern District of California. The complaint alleged (a) that all defendants owed Local 343 lost wages and union dues for North Bay employees (Count I), (b) that all defendants owed the trust funds delinquent trust contributions for North Bay employees (Count II), (c) that all defendants had committed fraud by concealing their relationship and making trust fund contributions only on behalf of Nor-Cal's employees (Count III), and (d) that all defendants were liable for punitive damages (Count IV) (E.R. 1-11).

The plaintiffs – which were, at the inception of the suit, the respondent trust funds and Local 343 – invoked the district court's jurisdiction under Section 502 of ERISA (29 U.S.C. § 1132) and Section 301 of the Labor-Management Relations Act ("LMRA") (29 U.S.C. § 185(a)).

3. The Union's Claim Is Dismissed.

In 1988, on the defendants' motion, the district court dismissed Local 343's claim for lost wages and union dues (Count I) on the ground that the claim was subject to compulsory arbitration under the collective-bargaining agreement. The only plaintiffs remaining in the action thereafter were the trust funds themselves.

4. The District Court Grants Summary Judgment.

In April 1992, the district court granted summary judgment in favor of the trust funds against all the defendants. *U.A. Local No. 343 of the United Ass'n of Journeymen v. Nor-Cal Plumbing*, 797 F. Supp. 767 (N.D. Cal. 1992) (Pet. App. E, pp. 41a – 52a, *infra*). The district court held that North Bay was the "alter ego" of Nor-Cal and that it was, therefore, legally obligated to make contributions on behalf of North Bay employees to the trust funds. The district court also "pierced the corporate veil" and held Mr. and Mrs. Pettit personally liable for the obligations of their corporations. The district court's damage award was for fringe benefit contributions ($1,066,820) liquidated damages ($106,682), interest ($899,066), and attorneys' fees ($478,736). The district court also awarded $2,000,000 in punitive damages.

5. The Ninth Circuit Reverses.

The court of appeals reversed the entry of summary judgment on the ground that there were unresolved issues of fact on the allegation that the separate identities of the two corporations was a sham and on the claim that the corporate veils should be pierced so as to make the Pettits individually liable. *U.A. Local 343 of the United Ass'n of Journeymen v. Nor-Cal Plumbing*, 48 F.3d 1465 (9th Cir. 1995) (Pet. App. F, pp. 53a – 72a, *infra*). This Court denied the respondents' petition for certiorari. 516 U.S. 912 (1995).

6. A Lengthy Jury Trial Is Held.

Following the Ninth Circuit's remand, the district court dismissed the fraud claim (Count III) against the Pettits individually, and the trust funds voluntarily dismissed the punitive-damages claim (Count IV) (E.R. 73; C.R. 490). The case proceeded to a seven-week jury trial against all

defendants for delinquent trust contributions (Count II) and against the corporations for fraud (Count III). The jury returned a verdict in favor of the plaintiffs against both corporations and Mr. Pettit for compensatory damages of $1,812,897.60. It did not find Mrs. Pettit personally liable (E.R. 124-126). The district court thereafter held that the plaintiffs were also entitled to recover attorneys' fees and other expenses (C.R. 658).

7. The Ninth Circuit Affirms.

The petitioners appealed the district court's ruling that it had jurisdiction under ERISA and the LMRA. The court of appeals held that since the trust funds are not "a participant beneficiary, or fiduciary" under Section 502(a)(3) and 502(e) of ERISA, they could not initiate an action to enforce any provision of ERISA. Pet App. A, pp. 4a – 9a, *infra*. With regard to Section 301 of the LMRA, however, the court of appeals held that the trust funds could maintain a federal action under Section 301(a) and that the "veil-piercing" claim against the Pettits could be asserted under Section 301 "because it merely concerns the remedy attached to a breach of contract claim governed by LMRA." Pet. App. A, p. 13a, *infra*.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S DECISION EFFECTIVELY NULLIFIES THIS COURT'S RULING IN *PEACOCK v. THOMAS*

This Court decided in *Peacock v. Thomas*, 516 U.S. 349 (1996), that a federal district court did not have jurisdiction over an action brought under ERISA against an officer and shareholder of a corporation that allegedly breached contractual and fiduciary duties in failing to make contributions to a pension benefits plan. The Court held in *Peacock* that the legal theory under which the corporate veil may be pierced and an individual shareholder held liable does not turn on "a violation of an ERISA provision or term of the plan." 516 U.S. at 354. Rather, it is "a means of imposing liability on an underlying cause of action." *Id.* (Quoting 1 C. Keating & G. O'Gradney, Fletcher Cyclopedia of Law of Private Corporations § 41, p. 603 (perm. ed. 1990)).

For the very same reason stated in *Peacock*, there is also no federal jurisdiction under Section 301 on a "veil-piercing" theory against an individual stockholder, director or owner of a corporation that has failed to make pension plan contributions. The factual and legal issues that arise when such a claim is made relate to the intent of the individual in forming the corporation, the extent to which the corporation operated independently of the individuals, and many other questions that concern the corporation's business operations.

The claim made by the trust funds in this case is plainly *not* the kind of contract claim that Section 301(a) contemplates. This Court observed in *Allis-Chalmers v. Lueck*, 471 U.S. 202, 220 (1985), that the touchstone of federal-court jurisdiction under Section 301 is the resolution of a dispute that is "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract" or that is "inextricably intertwined" with such terms. *See also Steelworkers v. Rawson*, 495 U.S. 362, 371 (1990); *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 409-410 (1988); *Caterpillar v. Williams*, 482 U.S. 386, 394 (1987). Whether an individual who owns and operates a corporation that has failed to make pension-plan contributions is liable on a "veil-piercing" theory is not an interpretation-of-contract issue

The court of appeals explained its holding in this case by referring to earlier "LMRA suits to recover unpaid contributions" in which the Ninth Circuit has "developed a substantial body of federal common-law regarding veil-piercing in this context" (Pet. App. A, p. 12a, *infra*). The cited decisions implementing this Ninth Circuit "body of federal common-law" – *Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Service*, 736 F.2d 516 (9th Cir. 1984); *Audit Services v. Rolfson*, 641 F.2d 757 (9th Cir. 1981); *Seymour v. Hull & Moreland Eng'g*, 605 F.2d 1105 (9th Cir. 1979) – warrant re-examination in light of this Court's recent rulings in *Peacock v. Thomas* and in *Textron Lycoming Reciprocating Engine Division v. United Automobile Aerospace and Agricultural Implement Workers of America*, 523 U.S. 653 (1998) The Ninth Circuit's decisions creating a "body of federal common-law" on the subject of veil-piercing is inconsistent with this Court's recent decisions regarding Section 301 jurisdiction and federal-court authority to consider veil-piercing theories.

To be sure, *Peacock v. Thomas* concerned federal district-court jurisdiction over a wholly independent lawsuit that followed the entry of judgment against the corporation alone. But the *jurisdictional issue is the same whether the* individual defendant is joined in the initial lawsuit against the corporation or is first sued later. This Court said in *Finley v. United States*, 490 U.S. 545, 556 (1989), that "a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties." Hence the trust funds in this case are either legally able to sue Mr. Pettit on a "veil-piercing" theory in federal court or they are not – regardless of whether they join him in an action against the corporations or wait to sue him separately at a later date.[2] *Peacock v. Thomas* held that ERISA conferred no jurisdiction to proceed in a federal court to pierce a corporate veil and collect pension-fund contributions. Unless *Peacock v. Thomas* can easily be avoided by the expedient of invoking Section 301 of the LMRA instead of ERISA, the same result must follow in this case.

The question is an important one. If this decision is permitted to stand, it will encourage plaintiffs in lawsuits brought to collect delinquent contributions to join individual stockholders, directors and owners and ask the court in each case to "pierce the veil." This will increase the burden on the federal courts to decide questions that should more reasonably be presented to state courts and decided by them.[3]

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[2] Since this action was initiated in 1987, it is not subject to 28 U.S.C. § 1367, which was enacted after *Finley* and provides for "supplemental jurisdiction." Section 1367 was enacted in 1990 and is not retroactive. *See* Pub. L. No. 101-650 § 310(c).

[3] The enactment in 1990 of the supplemental jurisdiction provision found in 28 U.S.C. § 1367 does not affect this concern. Since "veil-piercing" issues often overwhelm the contract issues on which Section 301 jurisdiction is based, a court may, even after the enactment

If the Ninth Circuit's decision in this case is permitted to stand, the federal courts will be encouraged to develop substantive "veil-piercing" standards for pension-fund cases bought under Section 301. But this Court held in *Peacock* that there is no substantive body of "veil-piercing" law that warrants the exercise of jurisdiction under ERISA. 516 U.S. at 354.

Although the court of appeals gave a passing nod to this Court's recent decisions in *Textron Lycoming* and *Peacock v. Thomas* (*see* Pet. App. A, pp. 10a, 12a, *infra*), the court fundamentally ignored those rulings. It maintained the Ninth Circuit's prior course of opening wide the doors of federal courts to claims against non-signatories and enforcement of judgments against corporate officers or stockholders for the liabilities of the corporations. That course – and its application to this case – violate the jurisdictional language of Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a).

Section 301(a) creates jurisdiction in a federal court over "[s]uits for violation of contracts between an employer and a labor organization . . . or between any such labor organizations." This Court held in *Textron Lycoming* that a lawsuit by a labor organization against an employer to declare a labor contract voidable and to collect damages for misrepresentation and concealment was not a claim that a labor contract had been violated and was not, therefore, authorized by Section 301(a). By the same token, the "veil-piercing" claim made in this case is not within the language of Section 301(a). And in *Peacock v. Thomas*, *supra*, this Court held that there was no federal jurisdiction over a lawsuit seeking a judgment against corporate owners on a

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of Section 1367, properly decline to exercise supplemental jurisdiction over a veil-piercing claim under the provisions of Section 1367(c).

"veil-piercing claim" or any other theory of vicarious liability. *See* 516 U.S. at 352-354.

The combined effect of these two recent decisions by this Court is to limit Section 301(a) actions to enforcement of the terms of the labor contract against a signatory or its "alter ego." It does not extend to ancillary enforcement of employer liability.

II

ERISA OCCUPIES THE FIELD AND SPECIFIES THE ONLY PARTIES WHO MAY SUE EMPLOYERS FOR DELINQUENT PENSION-PLAN CONTRIBUTIONS

The court of appeals held that the trust funds that initiated this lawsuit were not authorized by ERISA to be plaintiffs in such an action (Pet. App. A, pp. 4a – 9a, *infra)*. Nonetheless, the court held that the same entities that could not sue under ERISA could maintain an action for violation of the collective-bargaining agreement under Section 301(a). The holding of the court below utilizes Section 301(a) to undermine a limitation that Congress deliberately incorporated into ERISA.

Section 515 of ERISA (p. 3, *supra*) establishes an obligation enforceable under ERISA on employers who are parties to labor contracts to make contributions "in accordance with the terms and conditions of such plan or such agreement." Section 502 (g)(2) describes a court's power when it enforces a judgment "in favor of the plan" in an action brought "by a fiduciary" (p. 3, *supra*). And

Section 502 (e)(1) specifies that a district court is to have jurisdiction when an action is brought by "a participant, beneficiary, or fiduciary." The statutory scheme defined by ERISA clearly precludes an action such as this one, instituted by trust funds themselves. Although such funds are recognized by ERISA as potential parties in a lawsuit (*see* Section 502(d)(1), p. 2, *supra*), they were not authorized by Congress to prosecute actions to collect delinquent payments.

This Court said in *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 21 (1983), that "[t]he express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties . . . as to whom Congress presumably determined that a right to enter federal court was necessary to further the statute's purposes." This deliberate Congressional policy -- which limits the parties who may "enter federal court" in order to enforce the rights enumerated in ERISA – is thwarted if Section 301(a) is read – as the court of appeals read it – to entitle other entities such as the trust funds themselves to initiate federal actions to collect delinquent pension-fund obligations.

In *Steelworkers v. United Eng'g.*, 52 F.3d 1386 (6th Cir. 1995), the Sixth Circuit reached a result that is inconsistent with the Ninth Circuit's in this case. The Sixth Circuit held that the enactment of ERISA "precluded" federal courts from entertaining the same kind of actions under Section 301 that ERISA specifically authorizes. *Id.* at 1394. As was true in the Sixth Circuit's *Steelworkers* case, the enactment of ERISA was an instance in which Congress "has now spoken directly" to the question of who may sue to collect delinquent pension plan contributions. *Id.* The need for a Section 301 remedy (and the jurisdiction to proceed under Section 301) therefore "disappears" once Congress grants a specific remedy for a particular kind of violation of a labor contract. That is what Congress did when it

authorized only participants, beneficiaries or fiduciaries -- but not pension funds -- to initiate actions for delinquent pension-plan contributions.

III

A FEDERAL COURT MAY NOT RENDER A DECISION THAT IT PARTIALLY EMBARGOES AGAINST CITATION AND PUBLICATION

Until the early 1960s, virtually all federal appellate decisions were published and constituted citable precedent. As a result of a 1964 Judicial Conference suggestion, all of the courts of appeal have now adopted local rules under which some decisions are designated as "not for publication." *See generally* Martha J. Dragich, *Will The Federal Courts Of Appeal Perish If They Publish? Or Does the Declining Use of Opinions To Explain And Justify Judicial Decisions Pose A Greater Threat*, 44 Am. U.L. Rev. 757, 760-762 (1995).

The most recent statistics show that almost 75% of all federal appellate decisions are now designated as "not for publication." The Seventh Circuit publishes the greatest share of its decisions (slightly more than 50%), and the Fourth Circuit publishes the least (less than 10%):

U.S. Court of Appeals – Types of Opinions or Orders Filed in Cases Terminated On the Merits During The Twelve Month Period Ended September 30, 1998[4]

Circuit	Total Cases	Published	Unpub-lished	Percent Unpub-lished
All	24,828	6,247	18,581	74.6%
D.C.	633	274	359	56.7%
First	740	370	370	50.0%
Second	1,721	514	1,207	70.1%
Third	1,740	254	1,486	85.4%
Fourth	2,569	242	2,327	90.6%
Fifth	3,552	1,030	2,522	71.0%
Sixth	1,861	399	1,462	78.6%
Seventh	1,415	716	699	49.4%
Eighth	1,856	778	1,078	58.1%
Ninth	4,337	710	3,627	83.6%
Tenth	1,576	436	1,140	72.3%
Eleventh	2,828	524	2,304	81.5%

The First, Second, Seventh and Ninth Circuits, designate, by local rule, that their non-published decisions are "non-precedential." Litigants are barred from citing these decisions.[5] The remaining circuits "disfavor" citation of their non-published decisions but nonetheless permit it. The Fifth, Eighth, Tenth, and Eleventh Circuits classify such decisions as "non-precedential" while the Third, Fourth, and Sixth Circuits acknowledge, either explicitly or implicitly, the precedential effect of their unpublished decisions.[6]

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[4] This statistical data is excerpted from Table S-3 of the Judicial Business of the U.S. Courts, *Annual Report of the Director, 1998*. Excluded from this excerpt are the 82 oral decisions issued by the Sixth Circuit which Table S-3 includes as unpublished decisions.

[5] First Circuit Local Rule 36.1; Second Circuit Local Rule .23; Seventh Circuit Local Rule 53; Ninth Circuit Local Rule 36-3.

[6] Third Circuit Local Rule IOP 5.1-5.8; Fourth Circuit Local Rule 36(c); Fifth Circuit Local Rule 47.5; Sixth Circuit Local Rule 206;

The practice of selective publication has never been authorized by Congress or approved by this Court. Justice Stevens, dissenting from a summary disposition in *County of Los Angeles v. Kling*, 474 U.S. 936, 938 (1985), described the practice of selective publication as "plainly wrong."

This Court has occasionally expressed its disapproval of a cou: of appeals' issuance of a nonpublishable opinion. In *U.S. v. Edge Broad.*, 509 U.S. 418 (1993), the Sixth Circuit, in an unpublished decision, had held that a federal statute prohibiting the broadcasting of lottery advertisements was unconstitutional. In reversing the court of appeals, this Court observed: "We deem it remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* opinion." *Id.* at 425 n.3. *See also Board of Educ. v. Rowley*, 458 U.S. 176 (1982), where this Court issued an extensive opinion reversing an "unpublished" decision of the Second Circuit.

Selective publication has been strongly condemned in academic writings, which have concluded that it is flawed in concept and implementation. E.g., William M. Richman & William L. Reynolds, *Elitism, Expediency, And the New Certiorari: Requiem For The Learned Hand Tradition*, 81 Cornell L. Rev. 273 (1996).

And the courts of appeals are in conflict over the permissibility of declaring appellate decisions "noncitable." The Fourth Circuit held in *Jones v. Superintendent, Virginia State Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972), that "any decision is by definition a precedent, and that we cannot

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Eighth Circuit Local Rule 28A; Tenth Circuit Local Rule 36.3; and Eleventh Circuit Local Rule 36-2.

deny litigants and the bar the right to urge upon us what we have previously done." This view was also expressed in dissent by Chief Judge Holloway and Judges Barrett and Baldock of the Tenth Circuit when the Tenth Circuit Rules were promulgated. *See In re Rules of United States Court of Appeals*, 955 F.2d 36, 37 (10th Cir. 1992). The Sixth Circuit recognizes counsel's right to cite an unpublished decision for its "precedential value." Sixth Circuit Local Rule 206(c).

Petitioners' counsel asked the court of appeals to publish its subsidiary opinion and to permit its citation. *See* the letter of September 9, 1999, reproduced as Pet. App. G, pp. 73a – 77a, *infra*. That request was denied. Pet. App. D, p. 40a, *infra*.

The historical universal practice of relying on past judicial decisions as precedent imposes discipline on any court that renders a decision in a case or controversy. The deciding court knows that the legal principle it applies to the parties before it may control the disposition of future cases. Reliance on *stare decisis* does not, therefore, only add predictability to future transactions with legal consequences. It also ensures that justice is rationally administered in the case being decided.

When a court is free to render a decision that will not be published and *may not even be cited*, it is granted a license to enter a judgment for which there will be no future responsibility. This is inconsistent with the constitutional obligation of federal judges to administer the process of law to litigants in federal courts.

The practice has reached a new level with the decision of the court of appeals in this case. One appeal has resulted, in this case, in two opinions. An opinion on the subject of jurisdiction is published and citable. The second decision, which involves many important questions of

federal law, has been designated as nonpublishable and non-citable. If this bifurcation is permitted, a court can in a single appeal render judgments for which it is accountable as precedent and decide other issues, entirely in its own unreviewable discretion, in a framework of non-accountability.

Petitioners were prejudiced by the refusal to publish and allow citation of the subsidiary issues in this case because the panel that decided their case was freed from the responsibility that should accompany any court decision. The rationale for part of the decision of the court of appeals could not be a precedent for future cases. The petitioners are entitled to have the decision vacated and to have the case remanded for consideration by a panel that will be obliged to rule on the issues with the knowledge that its decision will be published and can be cited in the future.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1999

APPENDICES

LOCAL 159, 342, 343 & 444; LOCAL 343 UNITED ASSOC.
JOURNEYMEN & APPRENTICE TRAINING TRUST FD; LOCAL 343 UNITED ASSOC. OF PLUMBING, Plaintiffs-Appellees and Cross-Appellants,
v.
NOR-CAL PLUMBING, INC.; NORTH BAY PLUMBING, INC.; ELMAR LEE PETTIT, a.k.a. ELMER LEE PETTIT; AUDREY JEAN PETTIT, Defendants-Appellants and Cross-Appellees.

Nos. 96-16172, 96-16284

United States Court of Appeals
Ninth Circuit

Jan. 11, 1999
Submission Deferred Jan. 12, 1999
Re-submitted Feb. 10, 1999

Patrick W. Jordan, Jeffer, Mangels, Butler & Marmaro, San Francisco, California, for defendants-appellants and cross-appellees Nor-Cal Plumbing, Inc., and Elmar Lee Pettit.

Henry F. Telfeian, Berkeley, California, for defendants-appellants and cross-appellees North Bay Plumbing, Inc., and Audrey Jean Pettit.

John J. Davis, Jr., McCarthy, Johnson & Miller, San Francisco, California, for plaintiffs-appellees and cross-appellants.

Before: WIGGINS, TASHIMA, and SILVERMAN, Circuit Judges.

TASHIMA, Circuit Judge:

Nor-Cal Plumbing, Inc. ("Nor-Cal"), a plumbing contracting business, was a signatory to a collective bargaining agreement ("CBA") with Local 343 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (the "Union"). The CBA incorporated a Trust Agreement obligating Nor-Cal to make pension and welfare benefit contributions to employee benefit plans (the "Trust Funds")[1] based on the number of hours worked by Nor-Cal's employees.

The owner and manager of Nor-Cal, Elmar Pettit, began "double-breasting" when he opened a non-union plumbing business, North Bay Plumbing, Inc. ("North Bay"), while still maintaining Nor-Cal, which was unionized. He started transferring work from Nor-Cal to North Bay, until Nor-Cal finally stopped bidding on jobs altogether and shut down its operations in 1987.

The Trust Funds sued Nor-Cal, North Bay, Pettit and his wife Audrey Pettit (collectively the "Employers"), on the theory that the CBA covered North Bay employees because North Bay was the alter ego of Nor-Cal. The suit primarily sought to recover contributions for hours worked by North Bay employees. A jury found that Nor-Cal and North Bay were alter egos and pierced the corporate veil as to Elmar Pettit, but not his wife. We must decide whether ERISA or LMRA provided subject matter jurisdiction over the action brought by the Trust Funds. We have appellate jurisdiction

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[1] The Trust Funds are funds established under § 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186, and in addition are pension and welfare benefit plans governed by § 3 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002.

under 28 U.S.C. § 1291, and we affirm on the ground that jurisdiction over the suit existed under LMRA.[2]

I.

The Trust Funds initially brought suit against the Employers in 1987, claiming that Nor-Cal and North Bay were alter egos and a single employer; therefore, that contributions were owed under the Trust Agreement to the Trust Funds for work done by North Bay employees. The Trust Funds also sought to hold the Pettits individually liable for the unpaid contributions. In 1992, the district court granted summary judgment in favor of the Trust Funds. It found that North Bay was the alter ego of Nor-Cal and that Nor-Cal and North Bay had breached the CBA by failing to observe its terms and conditions of employment with respect to North Bay employees. The district court also entered judgment against the Pettits in their individual capacities under a veil-piercing theory. *See UA Local No. 343 of the United Ass'n of Journeymen v. Nor-Cal Plumbing, Inc.*, 797 F. Supp. 767 (N.D. Cal. 1992).

On appeal, we reversed in part the district court's summary judgment ruling. *See UA Local 343 of the United Ass'n of Journeymen v. Nor-Cal Plumbing, Inc., 48 F.3d 1465* (9th Cir.), *cert. denied*, 516 U.S. 912, 116 S. Ct. 297, 133 L. Ed. 2d 203, (1995) ("*UA Local 343 I*"). We remanded the alter ego claim for trial because genuine issues of material fact remained as to whether Pettit had the intent to use North Bay in a sham effort to avoid Nor-Cal's CBA obligations. *See id.* at 1473-74. Similarly, we found that issues of fact remained

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[2] In a separate, unpublished disposition filed concurrently herewith, we deal with the myriad of remaining issues appealed by the parties.

on the request to pierce the corporate shell. *See id.* at 1475-76.

After a seven-week trial, a jury found that Nor-Cal and North Bay were indeed alter egos and that North Bay was therefore bound by the terms of the Trust Agreement. It also found Nor-Cal and North Bay liable for fraud. Finally, it determined that Pettit, but not his wife, should be held individually liable on a veil-piercing theory. It awarded compensatory damages in the amount of $1,812,897.60. The district court entered judgment on the verdict on April 15, 1996, and on May 21, 1996, entered an order denying the Employers' motion for judgment as a matter of law and for a new trial. Both sides now appeal.

II.

Whether subject matter jurisdiction exists is a question of law reviewed de novo. *See Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1153 (9th Cir. 1998). The district court's interpretation of a statute is also reviewed de novo. *See United States v. Mack*, 164 F.3d 467, 471 (9th Cir. 1999). The district court's finding that a party is a "fiduciary" under ERISA is a factual conclusion reviewed for clear error. *See Steen v. John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 913-14 (9th Cir. 1997).

III.

A. Jurisdiction under ERISA

Section 502(e) of ERISA grants exclusive jurisdiction to the district courts to hear "civil actions under this subchapter brought by the Secretary [of Labor] or by a participant, beneficiary, [or] fiduciary." 29 U.S.C. § 1132(e)(1). Similarly, § 502(a)(3) provides that "a participant, beneficiary, or fiduciary" has standing to enforce any ERISA

provisions. § 1132(a)(3)(ii). Therefore, "a federal court has no jurisdiction to hear a civil action under ERISA that is brought by a person who is not a 'participant, beneficiary, or fiduciary.'" *Harris v. Provident Life & Accident Ins. Co.*, 26 F.3d 930, 933 (9th Cir. 1994); *see Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27, , 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983).

The Employers contend that the district court improperly exercised jurisdiction under ERISA because the Trust Funds are neither a participant, beneficiary, nor fiduciary of an ERISA plan.[3] The Trust Funds assert that they are indeed "fiduciaries" under ERISA.

ERISA "defines 'fiduciary' not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993) (emphasis in original).

> [A] person is a fiduciary with respect to a plan [governed by ERISA] to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

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[3] The Employers raised this argument for the first time in their post-trial motion for judgment as a matter of law. We consider the argument because a challenge to federal subject matter jurisdiction cannot be waived and may be raised at any time. *See Quarty v. United States*, 170 F.3d 961, 973 n.7 (9th Cir. 1999).

29 U.S.C. § 1002(21)(A); *see Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co.*, 809 F.2d 617, 625-26 (9th Cir. 1987) ("An ERISA fiduciary includes anyone who exercises discretionary authority over the plan's management, anyone who exercises authority over the management of its assets, and anyone having discretionary authority or responsibility in the plan's administration.").

In providing that "a person is a fiduciary with respect to a plan," the statute suggests that the "person" and the "plan" must be separate entities. 29 U.S.C. § 1002(21)(A). ERISA includes a "trust" in its definition of "persons," *see* 29 U.S.C. § 1002(9), and thus a trust fund could qualify as a fiduciary of a separate ERISA plan so long as it exercises discretionary authority over the management or administration of the plan or its assets. *See Penn Cent. Corp. v. Western Conference of Teamsters Pension Trust Fund*, 75 F.3d 529, 532 (9th Cir. 1996) (finding that pension trust fund, as sponsor of multiemployer pension plan, administered plan); *Credit Managers Ass'n*, 809 F.2d at 625-26 (finding that master trust could be fiduciary to several individual employer ERISA plans because it collected and disposed of plan premiums and arranged for payment of claims); *U.S. Steel Mining Co. v. District 17, UMW*, 897 F.2d 149, 152 (4th Cir. 1990) (holding that "as the plan administrator, the [pension] fund is clearly a fiduciary"). We therefore disagree with the Second Circuit's contrary dicta that it is "difficult to imagine a situation in which a fund could fulfill" the role of a fiduciary and thus bring an ERISA suit in its own name. Pressroom Unions - *Printers League Income Sec. Fund v. Continental Assurance Co.*, 700 F.2d 889, 893 n.8 (2d Cir. 1983).

While there are cases where the facts reveal that a fund serves as a fiduciary to a pension plan that constitutes a separate entity, we do not confront such a situation here. The Trust Funds assert that they have fiduciary responsibility

over separate ERISA plans, but the record does not reflect that the Trust Funds and the plans are distinct entities. The Trust Agreement and even the Trust Funds' complaint treat them as one and the same. We conclude that, in the instant case, the Trust Funds are the ERISA plans themselves. *See* 29 U.S.C. § 1002(1), (2) (providing that employee benefit plan governed by ERISA can be a "fund"). As such, they cannot be ERISA fiduciaries with respect to the plans.

We recognize that a few of our decisions have treated trust funds as proper plaintiffs under ERISA without setting forth the facts establishing that the trust funds are "fiduciaries" with respect to distinct ERISA plans. *See, e.g., Pension Trust Fund for Operating Eng'rs v. Triple A Mach. Shop, Inc.*, 942 F.2d 1457, 1461 (9th Cir. 1991) (permitting ERISA action by trust fund against employer for failure to report timely and accurate pension fund contributions); *Brick Masons Pension Trust v. Industrial Fence & Supply, Inc.*, 839 F.2d 1333, 1335 (9th Cir. 1988) (trust funds allowed to bring ERISA suit for contributions from employer's alter ego); *Operating Eng'rs Pension Trust v. Cecil Backhoe Serv., Inc.*, 795 F.2d 1501, 1503 (9th Cir. 1986) (trust fund permitted to bring ERISA action to recover deficient contributions from employer); *Laborers Health & Welfare Trust Fund v. Kaufman & Broad, Inc.*, 707 F.2d 412, 415-16 (9th Cir. 1983) (treating suit brought by pension trust funds as suit brought by fiduciaries of trust funds). In none of these cases, however, was the issue of the trust funds' standing under ERISA raised. Accordingly, these decisions do not establish any general rule that trust funds have standing as fiduciaries. *See Leisnoi, Inc. v. United States*, 170 F.3d 1188, 1192 n.7 (9th Cir. 1999) (holding that court's silent exercise of jurisdiction does not create binding precedent).

We have previously held that an ERISA plan itself does not have standing to sue under § 502(a) of ERISA because it

is not a plan participant, beneficiary or fiduciary.[4] *See Steen*, 106 F.3d at 917. The Trust Funds urge and adopt the Sixth Circuit's approach to suits brought by plans under ERISA. *See Saramar Aluminium Co. v. Pension Plan for Employees of the Alumimum Indus. and Allied Indus.*, 782 F.2d 577, 581 (6th Cir. 1986). In Saramar, the Sixth Circuit concluded that "the Plan, as the party before the court, necessarily includes those who must act for the Plan to administer it and to effectuate its policies." Id. Because the Plan's administrators had discretionary control over the Plan, the court determined that "the Plan as a party, then, comes under the ERISA definition of a 'fiduciary.'" Id. *See also Louisiana Bricklayers & Trowel Trades Pension Fund & Welfare Fund v. Alfred Miller Gen. Masonry Contracting Co.*, 157 F.3d 404, 406 n.3 (5th Cir. 1998) (treating ERISA action brought by benefit plan as action brought by plan's trustees). Under

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[4] Section 502(d)(1) of ERISA provides that "[a]n employee benefit plan may sue or be sued under this subchapter as an entity." 29 U.S.C. § 1132(d)(1). This provision does not itself establish federal jurisdiction over actions brought under ERISA by pension plans. Section 502(d)(1) serves only to ensure that pension plans are treated as entities capable of suing and being sued in circumstances where the court can properly exercise jurisdiction. *See Pressroom Unions*, 700 F.2d at 893 (ERISA's provision "[a]ffording plans the power to sue does not, however, imply that they may bring actions under ERISA; it merely authorizes suits to be brought by funds in other situations where there would properly be jurisdiction.").

The Trust Funds imply that § 515 of ERISA, 29 U.S.C. § 1145, also confers jurisdiction over suits brought by trust funds. Section 515, however, merely creates a cause of action under ERISA for proceeding against an employer who is delinquent in making contributions to a plan. It does not create a separate basis for jurisdiction, but rather is subject to the jurisdictional restrictions in § 502(e)(1). *See Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 568 (2d Cir. 1995) ("Section 515 does not by itself confer jurisdiction; it is simply a substantive requirement that an employer make contributions to a multiemployer ERISA plan . . . .")

Steen, 106 F.3d at 917, however, we are not free to follow the Sixth Circuit and we decline to do so.[5]

We conclude that the Trust Funds, as ERISA plans, are not fiduciaries entitled to sue under ERISA.[6] Accordingly, subject matter does not exist under ERISA over this action brought by the Trust Funds.

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[5] A rule treating plans as incorporating their fiduciaries for purposes of subject matter jurisdiction and standing might also raise some unintended and undesirable consequences. For example, permitting a plan to bring suit as a fiduciary could cause statute of limitations problems. Under ERISA, the running of the statute of limitations does not commence until the plaintiff gains actual knowledge of the breach or violation, unless more than six years has passed since the breach or violation has occurred. *See* 29 U.S.C. § 1113. If the plan itself is the plaintiff, whose knowledge would trigger the statute? *See Landwehr v. DuPree*, 72 F.3d 726, 732 (9th Cir. 1995) (finding that "limitations period begins to run on the date that the person bringing suit learns of the breach or violation" rather than from first date that plan, through any of its agents, learned of breach because under latter interpretation, if fiduciary of plan breached his ERISA duties, statute would start to run on first day that fiduciary knew of breach, defeating purpose of tolling provision).

[6] In *Corder v. Howard Johnson & Co.*, 53 F.3d 225, 229-30 (9th Cir. 1995), we noted that we have sometimes applied § 502(g)(1) of ERISA, which provides that attorney's fees may be awarded when an action is brought by a participant, beneficiary, or fiduciary or an ERISA plan, to situations in which the action was brought by a plan itself against an employer for unpaid contributions. In searching for a rationale for allowing fees to a clearly unenumerated party under § 502(g)(1), we noted that "[p]erhaps the courts have presumed that a plan suing an employer for ERISA contributions is acting as an ERISA fiduciary." Id. at 230 n.4. We concluded that these cases had seemingly carved out an exception permitting attorney's fees awards in situations in which multi-employer benefit plans had sued their employers for non-payment of ERISA contributions and lost. *See id.* at 230. This weakly supported *de facto* exception to ERISA's strict standing rules is an insufficient basis for adoption of a rule which would presume that plans are acting as fiduciaries when they bring suit under ERISA for unpaid employer contributions.

B. Jurisdiction under LMRA

Although ERISA does not provide a source of jurisdiction, § 301 of LMRA, 29 U.S.C. § 185, does confer subject matter jurisdiction over the Trust Funds' action. Jurisdiction under § 301 extends to all "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . ." 29 U.S.C. § 185; *see Textron Lycoming Reciprocating Engine Div., AVCO Corp. v. UAW*, 523 U.S. 653, 118 S. Ct. 1626, 1629, 140 L. Ed. 2d 863 (1998). This grant of jurisdiction covers actions to recover fringe benefits stemming from collective bargaining agreements. *See, e.g., Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Serv., Inc.*, 736 F.2d 516, 518 (9th Cir. 1984). Section 301 does not limit the parties who may bring suit so long as the object of the suit is the enforcement of rights guaranteed by an agreement between an employer and a labor organization. *See Smith v. Evening News Ass'n*, 371 U.S. 195, 200, 83 S. Ct. 267, 9 L. Ed. 2d 246 (1962); *Associated Builders & Contractors, Inc. v. Local 302 IBEW*, 109 F.3d 1353, 1357 n.6 (9th Cir. 1997).

The Employers assert that § 301 jurisdiction extends only as far as ERISA jurisdiction. This argument fails because the Supreme Court has recognized that jurisdiction under LMRA may be broader than under ERISA. *See Franchise Tax Bd.*, 463 U.S. 1 at 25 & n.28, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (reading ERISA's standing and jurisdictional provisions narrowly while noting that the Court had "not taken a restrictive view of *who* may sue under § 301") (emphasis in original).

The Trust Agreement in this case is part of the CBA between the Union and Nor-Cal. The Trust Funds' suit was brought to enforce Nor-Cal's obligations under the Trust

Agreement to contribute pension and welfare benefits to the Trust Funds. The fact that the Trust Funds were not a signatory to the CBA is inconsequential, given the object of the lawsuit.

The Employers contend, however, that the Trust Funds are improper plaintiffs under § 301 and that the suit should have been brought by their Board of Trustees.[7] The fact that the Trust Funds are ERISA plans fatally undermines this argument. Section 502(d)(1) of ERISA bestows on ERISA plans the status of entities capable of bringing suit in any context in which the district court's exercise of subject matter jurisdiction is otherwise appropriate. *See* 29 U.S.C. § 1132(d)(1); *Pressroom Unions*, 700 F.2d at 893 (finding that "if a fund . . . wished to pursue a state law contract claim, § 1132(d)(1) would allow the fund to bring such an action its own name"). Therefore, the Trust Funds, as ERISA plans, are proper plaintiffs in this suit, and the action comes within the jurisdictional ambit of § 301.[8]

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[7] The Employers contend that we should defer to the legal principle employed by most states that a trustee must bring suit on behalf of a trust. "State law may be resorted to . . . only if it effectuates the policy which underlies federal labor legislation." *Seymour v. Hull & Moreland Eng'g*, 605 F.2d 1105, 1109 (9th Cir. 1979). This state law preference does not compliment federal labor policy: the Supreme Court has interpreted § 301 as not limiting the parties who may bring suit in order to further the policy that all suits regarding collective bargaining agreements be decided under a uniform body of federal substantive law. *See Smith*, 371 U.S. at 200-01, 83 S. Ct. 267.

[8] The Trust Funds alleged only one cause of action that falls only under ERISA and not LMRA: their claim that the Pettits should be personally liable for causing Nor-Cal and North Bay to violate § 515 of ERISA, 29 U.S.C. § 1145. The district court dismissed this claim for failure to state a claim under ERISA, and the Trust Funds appeal this dismissal. We now affirm the dismissal on the ground that there is no jurisdiction to support this claim that is wholly derivative of Nor-Cal and North Bay's liability under ERISA § 515. *See Granite State Ins. Co. v. Smart Modular Techs., Inc*, 76 F.3d 1023, 1026 (9th Cir. 1996) (finding

C. Jurisdiction Over Claim to Pierce the Corporate Veil

The Employers contend that LMRA does not provide a source of jurisdiction over the Trust Funds' attempt to pierce the corporate veil with respect to the Pettits.[9] We disagree.

We have previously considered requests to pierce the corporate veil in the context of LMRA suits to recover unpaid contributions and have developed a substantial body of federal common law regarding veil-piercing in this context. *See Laborers Clean-Up Contract Admin. Trust Fund*, 736 F.2d at 523-25; *Audit Serv., Inc. v. Rolfson*, 641 F.2d 757, 764 (9th Cir. 1981); *Seymour v. Hull & Moreland Eng'g*, 605 F.2d 1105, 1111 (9th Cir. 1979). A request to pierce the corporate veil is only a means of imposing liability for an underlying cause of action and is not a cause of action in and of itself. *Cf. Peacock v. Thomas*, 516 U.S. 349, 354, 116 S. Ct. 862, 133 L. Ed. 2d 817, (1996) (holding that "[p]iercing the corporate veil is not itself an independent ERISA cause of action, but rather is a means of imposing liability on an underlying cause of action") (internal quotation omitted).

In *UA Local 343 I*, we noted that "[t]he veil-piercing doctrine does not come into play in this case unless and until [the Trust Funds] establish their right to a money judgment against Nor-Cal and North Bay under the alter ego doctrine . . . [T]he traditional rules on piercing the corporate shell at most affect the quality of a labor organization's remedy if it finds itself with a judgment against an insolvent

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that we may affirm the district court's judgment on any ground supported by the record).

[9] The jury found only Pettit, and not his wife, individually liable.

corporate shell." 48 F.3d at 1476. In other words, whether the veil could be pierced as to Pettit hinged completely on the jury's determination of the Trust Funds' claim seeking enforcement of the Trust Agreement. The request to pierce the corporate shell is encompassed within LMRA's jurisdiction because it merely concerns the remedy attached to a breach of contract claim governed by LMRA.

IV.

The district court erred in concluding that it had jurisdiction over the Trust Funds' lawsuit under ERISA, because the Trust Funds were not "fiduciaries." The district court, however, did properly exercise jurisdiction over the action, including the request to pierce the corporate veil as to the Pettits, under LMRA.

Accordingly, the judgment of the district court is **AFFIRMED**.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOCAL 159, 342, 343 & 444; LOCAL 343 UNITED ASSOC. JOURNEYMEN & APPRENTICE TRAINING TRUST FD; LOCAL 343 UNITED ASSOC. OF PLUMBING,	)	
Plaintiffs-Appellees and Cross-Appellants,	)	Nos. 96-16172 & 96-16284
v.	)	D.C. No. CV-87-2365-SYI
NOR-CAL PLUMBING, INC.; NORTH BAY PLUMBING, INC., ELMAR LEE PETTIT, a.k.a. ELMER LEE PETTIT; AUDREY JEAN PETTIT, Defendants-Appellants and Cross-Appellees.	)	**MEMORANDUM***

Appeal from the United States District Court
for the Northern District of California
Susan Y. Illston, District Judge, Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

Argued and Submitted January 11, 1999
San Francisco, California
Submission Deferred January 12, 1999
Re-Submitted February 10, 1999

Before: WIGGINS, TASHIMA, AND SILVERMAN, Circuit Judges.

In our published Opinion filed concurrently herewith, we hold that the district court had subject matter jurisdiction of this case. Here, we dispose of the laundry list of substantive as well as procedural issues raised by both the Employers and the Trust Funds.[1] We affirm the district court in all respects.

I. Alter Ego Claim

The heart of the suit against the Employers is the Trust Funds' allegation that North Bay was the alter ego of Nor-Cal. At trial, the district court followed the two-part test laid out in *UA Local 343 of the United Ass'n of Journeymen v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465 (9th Cir.), *cert. denied*, 516 U.S. 912 (1995) ("*UA Local 343 I*"). Under *UA Local 343 I*, for determining whether North Bay was the alter ego of Nor-Cal the first step is to determine whether the two firms alleged to be alter egos meet the following criteria for finding that they are a single employer: (1) common ownership; (2) common management; (3) interrelation of operations; and (4) centralized control of labor relations. *See id.* at 1471. If this threshold showing is met, it must be shown that one of the two firms was created or being used in an attempt to avoid collective bargaining obligations "through a sham transaction or a technical change in

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[1] In this Memorandum, we use the same shorthand references we adopted in our published Opinion.

operations." *Id.* at 1472 (quoting *A. Dariano & Sons, Inc. v. District Council of Painters No. 33*, 869 F.2d 514, 518 (9th Cir. 1989)).

In *UA Local 343 I*, we found that there was ample evidence that Nor-Cal and North Bay constituted a single employer but remanded the case for a determination of the second part of the alter ego test: whether Pettit created and operated North Bay with the intent to avoid the obligations under Nor-Cal's CBA. *See id.* at 1471-74. Our finding that Nor-Cal and North Bay were a single employer was treated as the "law of the case" by the trial court. It read to the jury a Statement of Established Facts ("Statement") which summarized the decision in *UA Local 343 I* that Nor-Cal and North Bay constituted a single employer. The Statement properly explained to the jury that the "single employer" factors had been met and put into context the issue that remained for the jury – whether Pettit had the intent to avoid the collective bargaining obligations through a sham operation. *See Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342, 1344-45 (8th Cir. 1991) (in retrial limited to punitive damages issue, trial judge did not err in summarizing for the jury the issues established at the prior jury trial).[2]

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[2] The Employers complain that some of the facts included in the Statement were controverted by evidence at trial. For instance, the Statement mentioned that the fourth single employer factor – centralized control of labor relations – was supported by the fact that "Elmar Lee Pettit told associates that a non-union shop was the only way he could make any money." UA Local 343 I, 48 F.3d at 1472. At trial, Pettit testified that he never made any such statement. The Employers contend that they were prejudiced when the testimony of Pettit and their other witnesses at trial contradicted the "Established Facts" because the jury was instructed to accept as true the facts included in that instruction and necessarily would assume that the Employers' witnesses were lying. We conclude that any prejudice that resulted was not due to an error by the district court, which properly summarized the evidence supporting the single employer finding.

The Employers argue that the test in this Circuit for "alter ego" status is at odds with the test set forth in 1976 in *Crawford Door Sales Co.*, 226 NLRB 1144 (1976).[3] The district court used the same Ninth Circuit test in ruling on summary judgment that North Bay was the alter ago of Nor-Cal, *see UA Local No. 343 of the United Ass'n of Journeymen v. Nor-Cal Plumbing, Inc.*, 797 F. Supp. 767, 771-72 (N.D. Cal. 1992), and the Employers did not challenge the test on the first appeal. As such, the Employers waived their right to review of the issue on this subsequent appeal. *See Kesselring v. F/T Arctic Hero*, 95 F.3d 23, 24-25 (9th Cir. 1996).[4]

The Employers also contend that, in the circumstances of this case, the court erred in not departing from the "law of the case" when it applied the alter ego test set forth in *UA Local 343 I*. "Under the 'law of the case' doctrine, 'a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case.'" *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (quoting *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993)). "A

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[3] The NLRB enunciated seven factors to consider in determining whether two enterprises are alter egos: "'substantially identical' management, business purpose, operation, equipment, customers, and supervision, as well as ownership." Crawford Door Sales Co., 226 NLRB 1144.

[4] Even if the issue could be raised on this appeal, the Employers' argument would fail. Long ago, we found that the "alter ego" factors set forth in Crawford Door Sales Co., were "essentially the same factors" examined under our test to determine whether two firms constitute a single employer. See NLRB v. Big Bear Supermarkets No. 3, 640 F.2d 924, 928 n.5 (9th Cir. 1980). Therefore, this Court has already held that there is no substantive difference between the sets of factors.

court may have discretion to depart from the law of the case where: 1) the first decision is clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." *Id.* A district court's decision whether to apply the law of the case doctrine is reviewed for an abuse of discretion. *See Rebel Oil Co. v. Atlantic Richfield Co.*, 146 F.3d 1088, 1093 (9th Cir.), *cert. denied*, 119 S. Ct. 541 (1998).

First, the Employers point to *Johnstown Corp.*, 322 NLRD 818 (1997), decided after *UA Local 343 I*, contending that it constituted intervening authority because it changed the test for determining whether one employer is the alter ego of another. *Johnstown Corp.*, however, did not set forth a new alter ego test; it held only that the alter ego and single employer doctrines are related, but separate, concepts, and that the alter ego doctrine is not a mere subset of the single employer doctrine.[5] *See* 322 NLRD 818. The gist of *Johnstown Corp.* is that a court may find an entity to be an "alter ego" without first finding it to be a "single employer," making it easier to find that one entity is another's alter ego. *See id.* Nothing in *Johnstown Corp.* contradicts the substance of this Circuit's test or casts doubt on the district court's determination that the only remaining alter ego element to be decided at trial was the intent to use North Bay as a sham to avoid Nor-Cal's collective bargaining obligations.

Second, the Employers contend that the "law of the case" was contradicted by substantially different evidence

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[5] UA Local 343 I similarly recognized that the "single employer" and the "alter ego" theories are "conceptually related, but distinct theories." 48 F.3d at 1470.

put on trial. At trial, Nor-Cal's purchasing agent was shown to have no personal knowledge of facts included in his affidavit and relied upon by *UA Local 343 I* in finding that the third "single employer" factor – interrelation of operations between Nor-Cal and North Bay – had been established. *See* 48 F.3d at 1472. Even without the affidavit, however, there was sufficient evidence of the interrelation of operations to sustain summary judgment. *See id.* The Employers provide no other meaningful support for their claim that substantially different evidence was brought out a[t] trial. We conclude, therefore, that the district court correctly applied the law of the case regarding the alter ego test.

The Employers also argue that the Trust Funds relitigated the single employer factors under the guise of proving the intent prong of the alter ego test. They contend that the Trust Funds should only have been able to put on "new" evidence of Pettit's intent, and that the jury could not have made an objective finding on the issue of alter ego intent when faced with the same evidence used for the single-employer showing and instructed by the trial judge that these facts had been established in a prior proceeding. We reject this argument. Some of the evidence that established the single-employer factors was also relevant to the issues of alter ego intent, veil-piercing and § 301 fraud. The district court was not required to exclude it just because the finding that Nor-Cal and North Bay were single employers was not before the jury.

The Employers challenge several aspects of the instructions on the alter ego claim. A district court's formulation of civil jury instructions is generally reviewed for an abuse of discretion, although where one party claims that the trial court misstated the law, we must review the instructions de novo. *See Mockler v. Multnomah County*, 140 F.3d 808, 812 (9th Cir. 1998). The instruction must be

viewed as a whole and evaluated in the context of the whole trial. *See United States v. Marabelles*, 724 F.2d 1374, 1382 (9th Cir. 1984). An error instructing the jury in a civil case does not require reversal if it more probably than not was harmless. *See Snyder v. Freight Construction, Gen. Drivers, Warehousemen & Helpers, Local No. 287*, 175 F.3d 680, 689 n.12 (1999).

The Employers contend that the judge's instructions on alter ego liability effectively reversed the burden of proof in stating that a double-breasted operations "may be legal," when in fact they are legal unless shown to be alter egos. *See A. Dariano & Sons, Inc.*, 869 F.2d at 517 (finding that double-breasting "is not inherently illegal"). We find this argument unconvincing because the jury was explicitly instructed that the Trust Funds had the burden of proof on the alter ego claim.

Nor did the district court err in not including certain specific facts helpful to the Employers' case when it instructed the jury that it should consider certain factors in determining whether North Bay was Nor-Cal's alter ego. The judge instructed the jury to consider only general factors, such as "whether North Bay Plumbing was in reality a disguised continuance of the business operations of Nor-Cal Plumbing." Likewise, the trial judge adequately explained the nature of a double-breasted operation in stating that "a double-breasted operation occurs when the owners of one company that is a party to a labor agreement own a second company that is non-union," and in explaining when such an operation is not legal.

II. Piercing the Corporate Veil

A. The Use of a Jury Trial

Nor-Cal and Pettit contend that the district court erroneously found that a jury trial was required on the veil-piercing issue.[6] "Entitlement to a jury trial in federal court is a question of law reviewed de novo." *United States v. California Mobile Home Park Management Co.*, 107 F.3d 1347, 1377 (9th Cir. 1997).

We need not decide whether submission of the claim to a jury was an error, because, even if it were, it was harmless. There is no constitutional right to have one's case tried by a judge rather than a jury. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959) (holding that "the right to jury trial is a constitutional one . . . while no similar requirement protects trial by the court"); *United Press Ass'ns v. Charles*, 245 F.2d 21, 23 (9th Cir. 1957) (finding that "[t]here is no express prohibition of jury trial in the Constitution, treaties or laws of the United States"). The Federal Rules of Civil Procedure do provide that both parties' consent is necessary to hold a jury trial when there is no right to have a jury decide the claim. *See* Fed. R. Civ. P. 39(c) ("In all actions not triable of right by a jury . . . the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right."). While Nor-Cal and Pettit did not consent to a jury trial, reversal is not warranted because, as discussed below, the jury's verdict piercing the veil with respect to Pettit was supported by ample evidence and any error was more likely than not harmless. *See United Press*

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[6] North Bay and Audrey Pettit contend that they had the right to a jury trial on the issue.

Ass'ns, 245 F.2d at 53 (finding that any error in submitting case to jury was only procedural and should be reviewed for harmless error).

B. Jury Instructions

Whether to pierce the corporate veil and hold a shareholder personally liable depends on a three-part test: "[1] the amount of respect given to the separate identity of the corporation by its shareholders, [2] the degree of injustice visited on the litigants by recognition of the corporate entity, and [3] the fraudulent intent of the incorporators." *UA Local 343 I*, 48 F.3d at 1475. Once the first threshold factors is met, only one of the latter two must be satisfied. *See id.* In *UA Local 343 I*, we held that summary judgment was inappropriate because there were disputed facts regarding both the fraud and injustice factors. *See id.* Specifically, we held that, on the issue of fraud, the facts were in dispute as to whether the Pettits had misused the corporate form fraudulently to evade the obligations of the Trust Agreement. *See id.* at 1476. As for the injustice factor, we noted that the inability to collect, on its own, is not sufficient, and that genuine issues of fact remained. *See id.*

The Employers contend that the district court's jury instructions on veil-piercing strayed from the elements of the veil-piercing test. The district court instructed the jury that the fraud factor was satisfied if the jury found that "the Pettits had fraudulent or deceitful intent in forming or using their corporations." The court further told the jury that in deciding whether the Pettits had this intent, it should "consider undercapitalization of the corporation and the use of the corporate form to perpetrate a fraud, such as tax fraud, or to evade collective bargaining obligations." The court also instructed the jury to "consider whether the Pettits' use of corporate assets for personal gain diminished the ability of the corporations to satisfy their obligations."

The Employers allege that this charge to the jury misstated the law because in essence the jury was instructed that "garden-variety" fraud was sufficient to satisfy the fraud factor of the veil-piercing test.

The intent to avoid collective bargaining obligations sufficient to satisfy the alter ego theory of liability does not necessarily satisfy the fraud factor in the veil-piercing test. *See id.* at 1475. "Garden-variety fraud" – in this case, the Pettits' concealment of the relationship between North Bay and Nor-Cal – is, by itself, insufficient to pierce the corporate veil. *See id.* at 1476. Rather, the Trust Funds must show that the Pettits misused the corporate form to perpetrate their fraudulent scheme to evade Nor-Cal's obligations to make contributions to the Trust funds. *See id.*; *NLRB v. O'Neill*, 965 F.2d 1522, 1531 (9th Cir. 1992) (because individual had created corporation with intent to avoid collective bargaining obligations, fraud factor of veil-piercing test was satisfied).

The district court advised the jury to "consider the use of the corporate form . . . to evade legal obligations." The instruction tracked the language in *UA Local 343 I* that "[w]hether the Pettits misused the corporate form to fraudulently evade the obligations of the collective bargaining agreement is in dispute." 48 F.3d at 1476. The district court did not instruct the jury that "garden variety" fraud was sufficient to pierce the veil.

The Employers also contend that the trial judge's instruction was erroneous in including tax fraud as a proper basis for finding the Pettits liable on a veil-piercing theory.

To pierce the corporate shell, the Trust Funds must prove some fraudulent conduct directed at them specifically or at a group of creditors to which they belong. *See Board of*

Trustees of the Mill Cabinet Pension Trust Fund v. Valley Cabinet & Mfg. Co., 877 F.2d 769, 774 (9th Cir. 1989) (finding fraud factor not satisfied because there was no intent to defraud the trust fund); *Plumbers & Fitters, Local 761 v. Matt J. Zaich Const. Co.*, 418 F.2d 1054, 1058 (9th Cir. 1969) ("[T]he disregarding of the corporate form of business should not rest on the manner of doing business in general but should rest on the effect that the manner of doing business has on the particular transaction involved."). The Employers' tax fraud was not designed to help them avoid their obligations under the CBA. Therefore, evidence of tax fraud does not tend to prove the fraud factor of the veil-piercing test.

The district court's error, however, was more probably than not harmless, and therefore reversal is not warranted. As we discuss below, ample evidence supported the jury's conclusion that the fraud prong of the veil-piercing test was satisfied by Pettit's misuse of the corporate form fraudulently to evade the obligations of his corporations to make contributions to the Trust Funds. *See Benigni v. City of Hemet*, 879 F.2d 473, 480 (9th Cir. 1988) (holding that "[t]he failure to give a proper instruction did not prejudice the defendants because the evidence would have supported a verdict for the plaintiff even with that instruction").

The Employers also claim that the district court erred in instructing the jury that the "injustice" factor would be satisfied if the jury found "that it would be unjust to allow the Pettits to retain the rewards of their conduct." The Employers assert that the correct inquiry is "the degree of injustice *visited on the litigants* by recognition of the corporate entity," *UA Local 343 I*, 48 F.3d at 1475 (quoting *Seymour*, 605 F.2d at 1111) (emphasis added), not the injustice of not holding the Pettits personally liable. The Court, however, cured any error by subsequently instructing

the jury that it had to determine "whether injustice will result to the plaintiffs."[7]

C. Expert Testimony

The Employers argue that the Trust Funds' expert Paul Meyer was improperly permitted to testify to the legal conclusion that the Pettits should be found personally liable under the veil-piercing doctrine. On direct examination, the Trust Funds' counsel asked if Meyer had an opinion on "whether the corporate veil of Nor-Cal and North Bay has been pierced and the Pettits should be held personally responsible." The Employers' counsel objected on the ground that the testimony "goes to the ultimate issue." The judge overruled the objection. Meyer then responded, "Yes, that it my opinion," and that he believed "the corporations and the Pettits should be one in the same as it relates to the functioning of the expenses."

The district court's rulings on the admissibility of expert testimony are reviewed for an abuse of discretion.

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[7] We reject the Employers' additional arguments that the district court's instructions did not provide adequate guidance to the jury on several issues. The district court adequately conveyed to the jury that the corporate veil should only be lifted in certain limited circumstances. It did not abuse its discretion in not specifically instructing the jury that it could only pierce the veil if it found that the Pettits had "controlled and dominated the corporation such that the individuality of the corporation ceased" but instead in instructing the jury to consider a sum of factors regarding the Pettits' control and lack of separateness. Further, the court did not abuse its discretion in tailoring the instructions to include only those veil-piercing factors relevant to this case. Finally, the court's failure to explain the terms "undercapitalization" and "commingling" did not constitute an abuse of discretion, particularly when the instructions are evaluated in light of the long trial in which the jury became familiar with these terms through expert testimony. See Marabelles, 724 F.2d at 1382-83.

See Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167, 1176 (1999); *Desrosiers v. Flight Int'l*, 156 F.3d 952, 960 (9th Cir.), *cert. dismissed*, 119 S. Ct. 634 (1998). Such rulings will be reversed only if "manifestly erroneous." *Id.* (quoting *General Elec. Co. v. Joiner*, 118 S. Ct. 512, 517 (1997)).

The Federal Rules of Evidence permit an expert to testify to his opinion if the expert's "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. "[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704(a).

Expert testimony regarding a legal conclusion can be problematic. *See Aguilar v. International Longshoremen's Union Local No. 10*, 966 F.2d 443, 447 (9th Cir. 1992) (finding that reasonableness and foreseeability of plaintiff's reliance were matters of law for court's determination and therefore were inappropriate subjects for expert testimony); *United States v. Scop*, 846 F.2d 135, 139 (2d Cir. 1988) (holding that "Rule 704 was not intended to allow experts to offer opinions embodying legal conclusions."); *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 509-10 (2d Cir. 1977) (expert's testimony consisting of legal conclusions construing contract was inadmissible).

During the trial, however, the Employers did not specifically object that the testimony called for a "legal conclusion," but instead objected on the grounds that the testimony "goes to an ultimate issue." Given that testimony going to an "ultimate issue" is not inadmissible in a civil case solely on that ground, the Employers' objection on this ground was properly overruled and they failed to preserve for appeal their current objection that the testimony

concerned a legal conclusion. *See United States v. Gomez-Norena*, 908 F.2d 497, 500 (9th Cir. 1990).

The Employers further contend that, while the court allowed Meyer to testify to the legal conclusion on the veil-piercing issue, it did not permit the Employers' expert Samual Gallina to reach the issue. At trial, the Employers asked Gallina, "And have you formed an opinion as to whether or not the corporate form should be respected or whether the Pettits' personal assets should be reached?" The Trust Funds objected on the grounds that the question called for a legal conclusion, and the judge sustained the objection. The Employers' argument that this ruling was in error in light of the court's admission of Meyer's testimony fails because, unlike the Employers, the Trust Funds made the relevant objection that the question called for a legal conclusion. Moreover, the Employers were not actually prevented from receiving an answer to the question to which the Trust Funds had objected; counsel merely broke up the question into two separate ones and received answers to each part.

The Employers also argue that the judgment should be reversed because the Trust Funds' expert James Miller was permitted to testify repeatedly that the Employers had committed tax fraud. As discussed above, the evidence of tax fraud was not relevant to the fraud prong of the veil-piercing inquiry. Much of the evidence of the conduct that constitute tax fraud, however, was relevant to the "commingling" factor of the veil-piercing test, and thus the majority of the evidence was not erroneously admitted. Any error was harmless.[8]

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[8] We find the Employers' other objections to Miller's testimony to be without merit.

D. Substantial Evidence

The Employers appeal the district court's denial of their motion for judgment as a matter of law on the veil-piercing claim, arguing that the jury's verdict on this issue was not supported by substantial evidence. Specifically, they dispute whether substantial evidence supports the fraud and injustice prongs of the veil-piercing inquiry. The denial of a motion for judgment as a matter of law is reviewed de novo. *See Scott v. Ross*, 140 F.3d 1275, 1281 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1285 (1999). Judgment as a matter of law should be granted where the evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury's. *See id.*

We agree that evidence of Pettit's tax fraud should not be considered in determining whether there is substantial evidence supporting the fraud prong. We find, however, that substantial evidence buttresses the conclusion that Pettit abused the corporate form fraudulently to evade his contractual obligations to make contributions to the Trust Funds. Contrary to the Employers' contention, much of the same evidence relevant to prove under the alter ego theory that North Bay was created and operated "in an attempt to avoid the obligations of Nor-Cal's collective bargaining agreement," *UA Local 343 I*, 48 F.3d at 1473, will also be relevant to show the Employers' abuse of the corporate form to avoid its contractual obligations under the veil-piercing test. *UA Local 343 I* held only that proving labor law alter ego liability is not necessarily sufficient on its own to satisfy the fraudulent intent element of the veil-piercing test. *See id.* at 1475. We previously found that there was substantial evidence offered at the summary judgment stage that Pettit's purpose in establishing North Bay was to avoid his contractual obligations to make contributions to the Trust Funds. *See id.* at 1473. When added to the evidence of the

abuse of the corporate form elicited through the Trust Funds' experts' testimony, along with all the other evidence adduced at trial, we find that substantial evidence supported the jury's determination that Pettit misused the corporate forms of North Bay and Nor-Cal to perpetrate his fraud on the Trust Funds. Pettit's conduct appears to be a paradigmatic example of abusing the corporate form to defraud creditors.[9] Accordingly, we affirm the district court's denial of the Employer's motion for a judgment as a matter of law.

III. Section 301 Fraud Claim

The district court allowed the jury to consider whether North Bay and Nor-Cal were guilty of fraud under § 301 of LMRA in deliberately concealing through affirmative misrepresentations that they were alter egos, thereby inducing the Trust Funds not to exercise their rights based on the Nor-Cal CBA. The jury held Nor-Cal and North Bay liable on the claim, and the Employers now appeal this basis of liability. We need not consider the propriety of this claim, however, because the jury returned a special verdict specifically finding Nor-Cal and North Bay liable on the alter ego theory. The jury's express adoption of this theory is sufficient alone to support the judgment against Nor-Cal and North Bay. *See Taylor v. Burlington N. R.R. Co.*, 787 F.2d 1309, 1315 (9th Cir. 1986).

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[9] Because of the substantial evidence of Pettit's fraudulent intent sufficient to uphold the verdict imposing individual liability on Pettit, we need not consider whether the Trust Funds presented substantial evidence to satisfy the injustice factor of the veil-piercing inquiry.

The district court dismissed a similar fraud claim against the individual Pettits. The Trust Funds appeal this determination.[10]

In suits under § 301, we have refused to impose personal liability on the sole shareholder of a corporate employer that has breached its obligations under LMRA, except when the veil-piercing test has been satisfied. *See Audit Servs., Inc. v. Rolfson*, 641 F.2d 757, 764 (9th Cir. 1981). *See also Antol v. Esposto*, 100 F.3d 1111, 1118 (3rd Cir. 1997) (nothing that individual corporate officers are not liable under § 301 when there is no basis for piercing the corporate veil).[11] Therefore, the district court did not err in striking the cause of action under § 301 against the Pettits.

IV. Evidentiary Objections

The Employers contend that the Trust Funds' expert witnesses, accountants Meyer, Miller and Steve Grannis, all relied on hearsay and information from lay witnesses in their testimony, and thus they argue that neither the experts' opinions nor the underlying data should have been admitted at trial. They correctly assert that much of the data underlying the experts' testimony could not be independently admitted into evidence because it was hearsay.

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[10] Although Pettit was found personally liable on a veil-piercing theory, and thus it is inconsequential whether the § 301 fraud claim against him should have been allowed to proceed, the jury did not pierce the veil with respect to his wife, and so we must determine whether the district court should have allowed the jury to consider the § 301 claim against her.

[11] Of course, where a collective bargaining agreement specifically provides for personal liability of a corporate officer, such a provision will be upheld. See Employee Painters' Trust v. J&B Finishes, 77 F.3d 1188, 1192 (9th Cir. 1996)

Meyer testified that it was common for experts testifying to similar issues to rely on sworn and unsworn statements of witnesses. Further, there is authority for accountants relying on lay witnesses in forming their opinions and relaying them at trial. *See United States v. Affleck*, 776 F.2d 1451, 1457 (10th Cir. 1985) (finding that accountant testifying as expert witness relied on reasonable data including hearsay from interviews with previous accountant of defendant, other former employees, and bankruptcy trustee); *International Adhesive Coating Co. v. Bolton Emerson Int'l., Inc.*, 851 F.2d 540, 545 (1st Cir. 1988) (holding that accountant expert witness has reasonably relied on interviews with company personnel). Because the district court determined that the data was of a type upon which accountants reasonably rely in forming their opinions, it did not err in permitting the experts to rely on this data in the course of their testimony or in admitting the data for the limited purpose of explaining the basis of their opinions. *See* Fed. R. Evid. 703; *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984) (holding that if information relied on by an expert is not independently admissible, it may be admitted to help explain expert's opinion but not to establish the trust of what it asserts). The district court properly instructed the jury that the hearsay evidence was to be considered only as a basis for the expert opinion and not as substantive evidence. *See Paddack*, 745 F.2d at 1262. Accordingly, the district judge did not abuse her discretion in admitting this evidence.

The Employers also contend that several of the Trust Funds' experts improperly gave their opinions on witness credibility in the course of testifying by relying on certain statements of witnesses while not relying on other evidence. In *Scop*, the Second Circuit found that it was improper for expert witnesses to offer opinions based on their assessment of the credibility of another witness's testimony at trial. *See* 846 F.2d at 142. *See also United States v. Barnard*, 490 F.2d

907, 912-13 (9th Cir. 1976) (holding that expert psychiatric testimony that defendant-witness was a sociopath who would lie to his advantage was improper opinion about defendant's credibility). The Trust Funds' experts did not directly or indirectly comment on the credibility of other witnesses, and thus *Scop* and *Barnard* are not on point. The experts merely chose to rely on certain evidence they deemed to be consistent with other evidence.[12] Every expert will make decisions as to which pieces of evidence to rely on; on cross-examination the opposing party is entitled to challenge why the expert seemingly ignored certain evidence.

The Employers contend, however, that they were not permitted to cross-examine the Trust Funds' experts to bring attention to the experts' decisions to ignore some evidence. "[T]he scope and extent of cross-examination of expert witnesses rests in the sound discretion of the trial court and 'is not subject to exception unless wholly arbitrary, unreasonable and abusive, and the examination need not be extended to permit interrogation about collateral, immaterial or irrelevant matters.'" *United States v. 10.48 Acres of Land*, 621 F.2d 338, 340 (9th Cir. 1980) (quoting *United States v. 25.02 Acres of Land*, 495 F.2d 1398, 1402 (10th Cir. 1974)). We find that the trial judge did permit cross-examination testing the foundation of the expert's opinion, and only excluded questions that were not relevant to the expert's testimony or were overly prejudicial. In cross-examining both Meyer and Miller, the Employers sought to bring to light allegations that the Trust Funds' investigator had gotten a witness drunk before taking his declaration. During their direct examinations, Meyer had not relied on that witness's testimony at all, and Miller had relied on only one piece of

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[12] The one occasion on which Meyer stated that he believed Nor-Cal's business records supported the testimony of a particular witness did not amount to a judgment on the credibility of the witness.

testimony from the declaration that was corroborated by the witness's later deposition testimony. The trial judge permitted the Employers to cross-examine Miller on his reliance of the witness's declaration for the one point from the declaration, but sustained the Trust Funds' objections to the Employers' attempt to further delve into the evidence of impropriety on the Trust Funds' part during the taking of the witness's declaration. Because Meyer or Miller did not rely extensively on the witness's declaration, the district court did not abuse its discretion in concluding that cross-examining them about the reliability of the declaration would not have been probative. Similarly, the district court did not abuse its discretion in excluding a question on the cross-examination of Meyer regarding prejudicial deposition testimony by Nor-Cal's bookkeeper when her testimony did not relate to any matter to which Meyer had testified.

The Employers also complain that the district court erred in refusing their request to admit the Lindquist files – 19 boxes of documents that the experts had perused before testifying – to show the jury the items that the Trust Funds' experts had chosen to ignore in forming their opinions. The Federal Rules of Evidence provide that experts may be required to disclose the sources upon which they have relied, but they do not make these sources automatically admissible. *See* Fed. R. Evid. 705. Moreover, cumulative and non-relevant evidence may be excluded, *see* Fed. R. Evid. 402, 403, and much of the evidence in the Lindquist files had already been admitted or was not probative. The Employers had access to all the contents and were free to introduce particular pieces of evidence. It was not an abuse of discretion to refuse to admit the Lindquist files into evidence wholesale.

The Employers also appeal the admission of certain evidence they deem was inadmissible hearsay. Hearsay rulings are reviewed for abuse of discretion. *See Hagood v.*

Sonoma County Water Agency, 81 F.3d 1465, 1479 n.24 (9th Cir. 1996).

The Employers contend that Trial Exhibits 48 and 53A, summaries based on a variety of records and testimony taken over the course of the litigation, were erroneously admitted. A summary is admissible if it helps boil down "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in a court . . . ." Fed. R. Evid. 1006. "The proponent of a summary must establish a foundation that: (1) the underlying materials upon which the summary is based are admissible in evidence; and (2) the underlying documents were made available to the opposing party for inspection." *Paddack*, 745 F.2d at 1259. "[I]t is clear that a summary of both inadmissible and admissible hearsay should not be admitted under Rule 1006." *Id.* at 1260. Where it is uncertain precisely which portions of the summary rest on inadmissible hearsay, the whole summary is inadmissible. *See id.* at 1261.

Exhibit 48, mainly comprised of Nor-Cal and North Bay records that constitute party admissions, was partly based on the deposition testimony of two customers of Nor-Cal and North Bay. Similarly, the data underlying Exhibit 53A primarily consisted of Nor-Cal and North Bay records, but did include summaries produced by one of Nor-Cal and North Bay's customers. Therefore, both exhibits contained hearsay. They were admitted over the Employers' objection that they contained hearsay and assumed facts not in evidence.

While a summary of hearsay properly admitted as a business record is admissible, *see Papadakis v. United States*, 208 F.2d 945, 951-52 (9th Cir. 1953), the Trust Funds did not lay a foundation for the underlying data to be admitted as business records. See Fed. R. Evid. 803(6).

Because the summaries contained hearsay to which no exception applies, it was error to admit them into evidence.

Reversal is only warranted, however, if prejudice is shown. *City of Long Beach v. Standard Oil Co.*, 46 F.3d 929, 936 (9th Cir. 1995) The exhibits in question were mainly based on the non-hearsay records of North Bay and Nor-Cal. The fact that the jury considered some hearsay statements of Nor-Cal and North Bay's customers did not prejudice the verdict. Therefore, reversal is not warranted on these grounds.

The Employers also challenge the admission of the testimony of two former North Bay employees regarding out-of-court statements made by John Adams, the deceased former supervisor of North Bay, about statements Pettit made to Adams. We found in *UA Local 343 I* that North Bay and Nor-Cal were a single employer, owned and operated by Pettit. *See* 48 F.3d at 1473. Therefore, Adams, as a North Bay employee, was Pettit's agent, and the statements Adams made within the scope of his employment were clearly admissible as agent admissions. *See* Fed. R. Evid. 801(d)(2)(D).

V. Special Verdict

The district court has broad discretion in deciding whether to employ a special or general verdict. *See United States v. Real Property Located at 20832 Big Rock Drive*, 51 F.3d 1402, 1408 (9th Cir. 1995). "This discretion extends to determining the content and layout of the verdict form, and any interrogatories submitted to the jury, provided the questions asked are reasonably capable of an interpretation that would allow the jury to address all factual issues essential to judgment." *Id.*

The special verdict form in this case asked the jury to answer the ultimate question with respect to each claim – alter ego liability, § 301 fraud, and veil-piercing – and then asked the jury to ascertain the amount of damages. The Employers contend that the verdict form should have asked for an answer on each element of each claim, thus ensuring that the jury understood the instructions given them. Given the deference accorded to the trial judge's choice of verdict forms and the great length and confusing nature of the verdict form the Employers proposed, we reject the Employers' argument. There was no abuse of discretion.

VI. Relitigation of Damages

The Trust Funds appeal the amount of damages awarded them at trial, claiming that the district court's calculation of compensatory damages at the summary judgment stage was the "law of the case" and that the amount should not have been relitigated at trial. We find that the doctrine of the "law of the case" is inapplicable to the amount of damages because *UA Local 343 I* did not decide the issue explicitly or by necessary implication. *See Rebel Oil Co.*, 146 F.3d at 1093. Our reversal of the grant of summary judgment necessarily nullified the award of compensatory damages and the Employers did not concede the validity of the amount awarded on summary judgment by not appealing the amount of damages in *UA Local 343 I*. *See Wheeler v. John Deere Co.*, 935 F.2d 1090, 1096 (10th Cir. 1991) (where first judgment was reversed, jury's award of damages was reversed and could not be reinstated at second trial, even though defendant failed to appeal amount of damages awarded by the first jury). The amount of consequently damages awarded by the jury stands.

VII. Conclusion

For the aforementioned reasons, the judgment of the district court is

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOCAL 159, 342, 343 & 444; LOCAL 343 UNITED ASSOC. JOURNEYMEN & APPRENTICE TRAINING TRUST FD; LOCAL 343 UNITED ASSOC. OF PLUMBING,	)	
Plaintiffs-Appellees and Cross-Appellants,	)	Nos. 96-16172 & 96-16284
v.	)	D.C. No. CV 87-2365-SYI
NOR-CAL PLUMBING, INC.; NORTH BAY PLUMBING, INC., ELMAR LEE PETTIT, a.k.a. ELMER LEE PETTIT; AUDREY JEAN PETTIT, Defendants-Appellants and Cross-Appellees.	)	**ORDER**

Before: WIGGINS, TASHIMA, and SILVERMAN, Circuit Judges.

The panel has voted to deny appellees' petition for rehearing and appellants' joint petition for rehearing. Judges Tashima and Silverman vote to deny appellants' joint

petition for rehearing en banc and Judge Wiggins so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. Fed. R. App. P. 35(b).

The petitions for rehearing and the petition for rehearing en banc are denied.

Dated: September 7, 1999

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOCAL 159, 342, 343 & 444; LOCAL 343 UNITED ASSOC. JOURNEYMEN & APPRENTICE TRAINING TRUST FD; LOCAL 343 UNITED ASSOC. OF PLUMBING,	)	
Plaintiffs-Appellees and Cross-Appellants,	)	Nos. 96-16172 & 96-16284
v.	)	D.C. No. CV 87-2365-SYI
NOR-CAL PLUMBING, INC.; NORTH BAY PLUMBING, INC., ELMAR LEE PETTIT, a.k.a. ELMER LEE PETTIT; AUDREY JEAN PETTIT, Defendants-Appellants and Cross-Appellees.	)	**ORDER**

Before: WIGGINS, TASHIMA, and SILVERMAN, Circuit Judges.

Appellants' joint request that the Memorandum portion of the disposition in these cases be designated for publication is denied.

Dated: October 14, 1999

U.A. LOCAL NO. 343 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; U.A. LOCAL NOS. 159, 342, 342 AND 444 COMBINED PENSION TRUST FUND; U.A. LOCAL NOS. 59, 342, 343 and 444 COMBINED HEALTH & WELFARE TRUST FUND; and U.A. LOCAL NO. 343 JOURNEY MAN AND APPRENTICE TRAINING TRUST FUND, Plaintiff, v. NOR-CAL PLUMBING, INC.; NORTH BAY PLUMBING, INC; ELMAR LEE PETTIT, a.k.a. Elmer Lee Pettit; and AUDREY JEAN PETTIT, Defendants.

No. C 87-2365 BAC

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

797 F. Supp. 767

April 22, 1992, Filed; April 23, 1992, Entered

COUNSEL:

John J. Davis, Jr., McCarthy, Johnson & Miller, 595 Market Street, San Francisco, CA 94105, For Plaintiff

Mark R. Thierman, Thierman, Cook, Brown & Prager, 601 California Street, San Francisco, CA 94108, Henry F. Telfeian, Keck, Mahin & Cate, 1 Maritime Plaza, San Francisco, CA 94111, for Defendants

ORDER GRANTING SUMMARY JUDGMENT

CAULFIELD, District Judge.

This matter comes before the court on defendants' motion for partial summary judgment and plaintiffs' cross-motion for partial summary judgment. Oral argument was heard on January 17, 1992. After careful consideration of the parties' written and oral arguments, documents submitted in support, and the record as a whole, the court finds it appropriate to DENY defendants' motion and GRANT plaintiffs' motion.

BACKGROUND

Plaintiffs are U.A. Local No. 343, a plumbers and pipefitters union, and the labor-management trust funds in which it participates. Defendant Nor-Cal Plumbing, Inc. ("Nor-Cal"), has been a party signatory to successive collective bargaining agreements with plaintiff U.A. Local 343 since at least 1965.[1] The complaint alleges that defendants transferred the business of Nor-Cal, owned by defendant Elmar Lee Pettit, to defendant North Bay Plumbing, Inc. ("North Bay"), which was established in 1980. North Bay is a non-union company allegedly owned by Mr. Pettit's wife, defendant Audrey Jean Pettit, but which plaintiffs contend was in fact owned, controlled and managed by Mr. Pettit. It is alleged that North Bay continued Nor-Cal's business, but has not honored U.A. Local 343's Labor Agreement (the "Agreement").

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[1] On or about June 30, 1983, Nor-Cal executed a two-year Memorandum of Understanding modifying the then-existing Master Labor Agreement by and between the Plumbing, Heating and Cooling Contractors Association of Napa, Solano and Lake Counties and plaintiff U.A. Local 343. On or about May 7, 1984 defendant Nor-Cal executed the Residential Plumbing Addendum to the Master Labor Agreement, extending the agreement to at least June 30, 1987

In Count II, plaintiff trust funds seek an audit in order to recover the pension, health and welfare and other fringe benefit contributions they should have received had defendants applied the Agreement to North Bay. Plaintiffs have obtained the audit through discovery, and seek judgment in the amount of $2,551,244.28 delineated as follows: 1) fringe benefit contributions - $1,066,820.07; 2) liquidated damages - $106,682.09; 3) interest - $899,066.00; 4) attorneys fees and litigation - $478,736.12. Their claims are made under Section 301 of the LMRA for breach of the Agreement and under Sections 502 and 515 of ERISA for failure to make the required contributions.

In Count III, plaintiffs claim that defendants fraudulently concealed the true nature and extent of their business through affirmative acts of deception as well as failures to disclose material information.

Count IV is a claim by plaintiff trust funds for punitive damages in an amount equal to compensatory damages based upon the alleged willful and malicious behavior of defendants. Plaintiffs seek an order granting summary judgment against all four defendants on Counts II, III and IV of the Complaint.[2]

STATUTE OF LIMITATIONS AND/OR LACHES

Defendants again attempt to raise a state [sic] of limitations or laches defense in this action. However, plaintiff's claims have already been held not to be time-barred. As Judge Schwarzer stated in his order dated May 24, 1988,

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[2] The Union's claims in Count I for wages and dues were dismissed without prejudice for pursuit under the Agreement's grievance procedure.

> This undisputed record of fraud, deception and obstruction suffices to estop these defendants from asserting the statute of limitations after January, 1981.

New facts have not been brought to light, but rather defendants seek to reargue points previously raised and rejected. The court will not entertain such arguments.

SUMMARY JUDGMENT

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate where the movant shows that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law. In making this determination, the Court must draw inferences in the light most favorable to the non-moving party, and the burden is on the movant to establish both the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 , 91 L. Ed. 2d 202 (1986). Once the moving party has met this burden, the non-moving party may not rest on the allegations in the pleadings, but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists. Thus, the non-moving party "must do more than show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1365, 89 L. Ed. 2d 538 (1986).

NOR-CAL AND NORTH BAY-ALTER EGO TEST

This case arises out of the alleged double-breasting of defendants. A double-breasted employer relationship is where a union-signatory business or its owners also have an

interest in another similar non-union business. Although double-breasting is not *per se* unlawful, if the non-union-business is found to be the "alter ego" of the union business, they will be held to have violated the labor agreement.

Plaintiffs allege that North Bay is the alter ego of Nor-Cal. Plaintiffs must first establish that the businesses are a single employer. After such an initial single employer finding, the court determines whether the non-union business is in reality either the disguised continuance of a former union signatory or an attempt to avoid the obligations of the union signatory's collective bargaining agreement through a sham transaction or a technical change in operation. *Haley & Haley, Inc. v. NLRB*, 880 F.2d 1147, 1149-50 (9th Cir. 1989); *Northwest Admrs., Inc. v. Con Iverson Trucking, Inc.*, 749 F.2d 1338, 1340 (9th Cir. 1984).

If the two businesses are found to be only a single employer, the N.L.R.B. must determine whether their employees together constitute an appropriate bargaining unit, and thus whether the double-breasted employer can be held liable under the labor agreement. *International Woodworkers of America v. Ketchikan Pulp Co.*, 611 F.2d 1295 (9th Cir. 1980). If the alter ego relationship is established, however, the Court may proceed directly to enforcement of the collective bargaining agreement. *A. Dariano & Sons, Inc. v. District Council of Painters No. 33*, 869 F.2d 514, 518 (9th Cir. 1989). Damages recoverable by trust funds in alter ego cases under ERISA consist of unpaid fringe benefit contributions plus liquidated damages, interest and attorneys' fees. 29 U.S.C. §§ 1132(g)(2), 1145.

The criteria for determining single employer status are 1) interrelation of operations, 2) common management, 3) centralized control of labor relations, and 4) common ownership. *NLRB v. Don Burgess Constr. Corp.*, 596 F.2d 378, 384 (9th Cir. 1979), 444 U.S. 940, 62 L. Ed. 2d 306,

100 S. Ct. 293 (1979). No one factor is controlling nor need all criteria be present. Id. "Single employer status ultimately depends on 'all the circumstances of the case' and is characterized as an absence of an 'arm's length relationship found among unintegrated companies.'" *Id.* at 384 (citations omitted).

The most important factor is centralized control of labor relations. *J.M. Tanaka Constr., Inc. v. NLRB*, 675 F.2d 1029, 1034 (9th Cir. 1982) (citing *Los Angeles Marine Hardware Co. v. NLRB*, 602 F.2d 1302, 1305 (9th Cir. 1979)). Commonly controlled labor relations can be shown either on the basis of common control of day-to-day labor matters, *Tanaka*, 675 F.2d at 1034, or by showing that the person in charge of the union company's labor relations made the decision that the second company would be non-union. *Burgess*, 596 F.2d at 385-86. It is undisputed that Mr. Pettit controlled Nor-Cal's labor relations. As for North Bay, sworn declarations and deposition testimony establish that Mr. Pettit handled the hiring, firing, promotions, demotions, training and supervising and thus controlled day-to-day labor matters. Moreover, extensive evidence establishes that Mr. Pettit concealed having established North Bay and made the decision that North Bay would be non-union.

Evidence of common control of labor relations also shows common management. In addition, the minutes of North Bay's original corporate directors' meeting show Mr. Pettit as North Bay's sole director, president and chairman.[3] Mr. Pettit was also the contractor's license qualifier and responsible managing officer for both Nor-Cal and North Bay. Under California law the qualifier is "responsible for exercising such direct supervision and control of [the

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[3] Another version of the same minutes shows Mrs. Pettit as the sole director, president, and chairman of North Bay.

contractor's] operations as is necessary to secure full compliance with the provisions of this chapter . . . ." Cal. Bus. & Prof. Code §7068.1. The Ninth Circuit has found this to be a significant factor. *Burgess*, 596 F.2d at 385.

The evidence also indicates that Mr. Pettit had financial control of North Bay, and in fact from mid-1983 through 1986, signed over half of North Bay's checks. Finally, according to their sworn declarations, customers dealt with Mr. Pettit when they wanted bids or had problems.

Uncontroverted evidence shows that Nor-Cal and North Bay had closely interrelated operations. They shared equipment, material and supplies, coordinated and combined purchases, and made a number of "loans" without interest or promissory notes. Thus, Nor-Cal and North Bay were not operated at "arm's length," but rather should be treated as a single employer.

Having established the threshold issue of single employer status, the court now addresses the alter ego issue. As explained by the Ninth Circuit in *Haley*, "the alter ego transfer is in essence a sham transaction, motivated by the employer's desire to avoid its contractual obligations." 880 F.2d at 1149 (citations omitted). There is substantial undisputed evidence that North Bay was set up in order to eliminate the high costs of dealing with the Union. Jack Couthit, North Bay's purchasing agent, has so testified. In addition, John Adams, the initial manager at North Bay, admitted that the purpose "was to transfer Nor-Cal's customers to North bay, close down Nor-Cal Plumbing, and then have a non-union shop."

Defendants transferred Nor-Cal's major customers to North Bay, including the two largest, Lewis Homes and Presley Homes. Frank Hodel, who was supposedly in charge of North Bay, has testified that he was surprised by the

transfer of the Presley Homes account, which took place when Mr. Pettit was on a fishing trip in Mexico with Garth Patterson, Presley's vice president. Kaufman and Broad's Bradbury Homes project was taken over by North Bay in the middle of the job, as testified by Cliff Russell. The person Mr. Russell dealt with for both Nor-Cal and North Bay was Mr. Pettit.

Defendants' assertion that Nor-Cal was unable to bid competitively is not supported by the evidence. Nor-Cal had been successful in obtaining bids, but Mr. Pettit and Nor-Cal Superintendent Dave Adams stopped bidding new work in December 1986. Dave Adams transferred to North Bay in January 1987.

The issue of whether an alter ego relationship exists is particularly fact-intensive, and frequently summary judgment is inappropriate. *See Sheet Metal Workers International Assoc. v. Arizona Mechanical & Stainless, Inc.*, 863 F.2d 647, 652 n. 5 (9th Cir. 1988). In this instance, however, plaintiffs' evidence, including defendants' admissions, documentary evidence, and the testimony of disinterested percipient witnesses, is overwhelming. Defendant's [sic] are unable to contradict plaintiffs' evidence by reliable documentary or disinterested third-party evidence.

The only evidence supporting defendants' position are the denials by Mr. Pettit of ownership and management of North Bay. These statements are contradicted by numerous previous statements by Mr. Pettit that he did own and manage it, including those contained in North Bay's contractors' license applications made under penalty of perjury. The Ninth Circuit has stated,

> The very object of summary judgment is to separate real and genuine issues from those

> that are formal or pretended, so that only the former may subject the moving party to the burden of trial. Here we are convinced that the issues of fact created by [the non-moving party] are not issues which this Court could reasonably characterize as genuine; rather, they are sham issues which should not subject the defendants to the burden of a trial.

Radobenko v. Automated Equipment Corp., 520 F.2d 540, 543-44 (9th Cir. 1975). Defendants' denials do not establish a genuine issue of material fact. Accordingly, summary judgment is GRANTED in favor of plaintiffs.

PERSONAL LIABILITY OF THE PETTITS

Ninth Circuit decisions have considered three factors in determining whether to pierce the corporate veil: 1) a unity of interest and ownership between the corporation and the shareholder such that the two no longer exist as separate entities; 2) failure to disregard the corporation would result in injustice; and 3) fraudulent intent of the incorporators to evade civil or criminal liability. *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1111 (9th Cir. 1979). Although plaintiff need only establish injustice or fraudulent intent in addition to disregard of the corporate identity, *Board of Trustees v. Valley Cabinet & Mfg. Co.*, 877 F.2d 769, 773 (9th Cir. 1989), all three factors are present here.

The evidence demonstrates that the Pettits did not respect the separate corporate identities of either Nor-Cal or North Bay. The Pettits regularly paid for personal expenses out of corporate funds, including grocery and hardware store bills, improvements on personally owned real estate, vehicles and repairs, life insurance, home utility bills, real estate tax and insurance on their property, and fees for preparing their wills. The Ninth Circuit has held that such commingling of

assets is "among the more serious abuses of the corporate identity." *Valley Cabinet*, 877 F.2d at 773. In addition, defendants' records contain references to large loans to and from the Pettits. These loans demonstrate a disregard of the corporate identity, because no promissory notes were ever executed and there is no evidence that interest was paid. *Laborers Clean-up Contract Admin. Trust Fund v. Uriarte Clean-up Service, Inc.*, 736 F.2d 516, 524 (9th Cir. 1984).

As for fraudulent intent, as Judge Schwarzer stated in his order of May 24, 1988, defendants' conduct with respect to North Bay presents "an undisputed record of fraud, deception and obstruction." The evidence establishes that North Bay was formed for the purpose of defrauding the union and the trust funds. Frank Hodel and Robert Dandor have testified that concealment of the two companies' relationship occurred on a daily basis. For example, Mr. Pettit frequently told North Bay plumbers that "you didn't see me here," and stated to Lewis Homes Superintendent Donald Burton that he had to "be careful to conceal his involvement with North Bay so that he would not get caught at doublebreasting." Defendants' fraudulently failed to report the work hours of their non-union plumbers. Post-incorporation use of the corporate form to perpetrate fraud satisfies the fraudulent intent element, especially where employee protection is at issue. *Valley Cabinet*, 877 F.2d at 773-74.

Moreover, it would be unjust to recognize the corporate entities, which would allow the Pettits to retain the financial rewards of their fraudulent scheme and would prevent plaintiffs' recovery.[4] The doctrine of piercing the corporate

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[4] According to the analysis of Michael Keiser, as of 1988, the combined assets of Nor-Cal and North Bay were approximately 127,000, whereas plaintiffs' claims total over $2,000,000.

veil "is designed to prevent a person from doing injury and then escaping responsibility by hiding behind a corporate shield." *Plumbers & Fitters v. Matt J. Zaich Constr. Co.*, 418 F.2d 1054, 58 (9th Cir. 1969).

Since the Pettits are personally liable under the corporate veil-piercing doctrine, the court does not reach the issue of whether the Pettits should be held personally liable as participating tortfeasors or under section 301 of the LMRA, 29 U.S.C. § 185.

PUNITIVE DAMAGES

The Ninth Circuit has held that an award of punitive damages under Section 502(g)(2)(E) of ERISA is warranted where the employers' refusal to make promised contributions was "willful, wanton and malicious." *Winterrowd v. David Freedman & Co.*, 724 F.2d 823, 826 (9th Cir. 1984) (citations omitted); *see also Cox v. Eichler*, 765 F. Supp. 601 (N.D. Cal. 1990); *Kuntz v. Reese*, 760 F.2d 926 (9th Cir. 1985), *withdrawn and vacated on other grounds*, 785 F.2d 1410 (1986). "Once the factual predicate for aggravated conduct is established, the imposition of punitive damages is discretionary with the trier of fact." *Winterrowd*, 724 F.2d at 826. Plaintiffs have established that defendants' refusal to make contributions were not only wilful, wanton and malicious, but also fraudulent. The court finds that a punitive damages award in the $2,000,000.00, approximately equal to plaintiffs' compensatory damages, is appropriate.

ATTORNEYS' FEE AND COSTS

As prevailing parties, the plaintiffs are entitled to a mandatory award of attorneys' fees to the plaintiff trust

funds under section 502(g)(2)(D) of ERISA. 29 U.S.C. § 1132(g)(2)(D).[5]

CONCLUSION

For the forgoing reasons, summary judgment its [sic] hereby granted in favor of plaintiff Trust Funds and against all defendants as to Counts II, III and IV. Defendants' motion for partial summary judgment is denied in its entirety. Defendants are directed to pay damages to plaintiff Trust Funds in the amount of $2,551,244.28 for fringe benefit contributions, liquidated damages, interest, and attorneys' fees and litigation expenses, plus an additional $2,000,000 in punitive damages.

IT IS SO ORDERED.

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[5] Section 502(g)(2)(D) provides:

> (1) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendants.

UA LOCAL 343 of the United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; UA LOCAL NOS. 159, 342, 343, and 444 COMBINED PENSION TRUST FUND; UA LOCAL NOS. 159, 342, 343 and 444 COMBINED HEALTH & WELFARE TRUST FUND; and UA LOCAL NO. 343 JOURNEYMAN AND APPRENTICE TRAINING TRUST FUND, Plaintiffs-Appellees, v. NOR-CAL PLUMBING, INC.; ELMAR LEE PETTIT; NORTH BAY PLUMBING, INC.; AUDREY JEAN PETTIT, Defendants-Appellants.

No. 92-15749

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

48 F.3d 1465

December 16, 1992, Argued and Submitted

October 14, 1994, Filed

As Amended February 28, 1995

COUNSEL: John M. Kelson, Oakland, California, for defendants-appellants North Bay Plumbing, Inc. and Audrey Jean Pettit.

Mark R. Thierman, Thierman, Cook, Brown & Prager, San Francisco, California, for defendants-appellants Nor-Cal Plumbing, Inc. and Elmar Lee Pettit.

John J. Davis, Jr., McCarthy, Johnson & Miller, San Francisco, California, for the plaintiffs-appellees.

Before: William A. Norris, Robert R. Beezer, and Andrew J. Kleinfeld, Circuit Judges.

NORRIS, Circuit Judge:

Appellant Elmar Lee Pettit is a plumbing contractor who, with appellant Audrey Pettit, his wife, owns both Nor-Cal Plumbing, Inc. and North Bay Plumbing, Inc. Nor-Cal is union, and North Bay is non-union. Appellees, Local 343 and the employee trust funds in which it participates, brought this action under Section 301 of the Labor Management Relations Act ("LMRA") and Section 502 of the Employee Retirement Income Security Act ("ERISA"), seeking damages for breach of the Nor-Cal collective bargaining agreement. The action is premised on the theory that the collective bargaining agreement between Local 343 and Nor-Cal covered North Bay as well because North Bay was the alter ego of Nor-Cal.

On the basis of "an undisputed record of fraud, deception and obstruction," the district court ruled on summary judgment that North Bay was the alter ego of Nor-Cal. Order Granting Summary Judgment at 10 (quoting Order of May 24, 1988). Consequently, the court held that appellants breached the collective bargaining agreement by failing to extend its terms and conditions of employment to North Bay employees. The district court awarded appellees $2.5 million in fringe benefit contributions, liquidated damages, interest, attorneys' fees and costs, and $2 million in punitive damages. Judgment was entered not only against Nor-Cal on

the theory that North Bay was its alter ego, but also against the Pettits in their individual capacities on the theory that appellants were entitled to pierce the corporate veil. On appeal, the defendants-appellants argue that the district court erred in granting summary judgment against Nor-Cal on the alter-ego theory, in failing to find the action time barred, in piercing the corporate veil to impose liability on the Pettits personally, and in awarding punitive damages. We uphold the court's ruling that the statute of limitations does not bar this action, but reverse summary judgment against Nor-Cal under the alter-ego theory and against the Pettits under the veil piercing doctrine. Because we reverse summary judgement, we vacate the award for punitive damages.

I

Primary Jurisdiction

As a preliminary matter, appellants argue that the doctrine of primary jurisdiction barred the district court from extending the Nor-Cal collective bargaining agreement to North Bay unless and until the National Labor Relations Board first determined that the employees of both firms constituted an appropriate bargaining unit. *See Brotherhood of Teamsters, Local No. 70 v. California Consolidators, Inc.*, 693 F.2d 81, 82-83 (9th Cir. 1982), *cert. denied*, 469 U.S. 887, 83 L. Ed. 2d 199, 105 S. Ct. 263 (1984). This argument misunderstands the differences between the two theories with which an illegal "double breasted" operation can be challenged.

Appellants are correct that it may be perfectly legal for a contractor to conduct business through a "double breasted" operation, one in which the same contractor owns both union

and non-union companies for legitimate business purposes.[1] In such cases, the collective bargaining agreement of the union firm does not ordinarily apply to the non-union firm. Out of concern, however, that some contractors would use double-breasted operations to avoid their collective bargaining obligations, the courts and the NLRB have developed two conceptually related, but distinct theories - "single employer" and "alter ego" - to guard against such abuse. *Carpenters' Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1275-77 (9th Cir. 1984), *cert. denied*, 471 U.S. 1015, 85 L. Ed. 2d 300, 105 S. Ct. 2018 (1985).

The requirements of these two theories overlap substantially. Under both theories, the district court must first determine whether the two firms are a single employer by measuring the degree of common ownership, management, operations, and labor relations. *See id.* at 1276. If this threshold requirement is met, the next step depends on which theory is pursued.

Under the "single employer" theory, the district court must defer to the NLRB, which has primary jurisdiction to determine whether the employees of both the union and non-union firms constitute an appropriate bargaining unit. Only if the NLRB finds that they constitute a single unit may the collective bargaining agreement with the union firm be extended to the non-union firm. *See South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800, 805-06, 48 L. Ed. 2d 382, 96 S. Ct. 1842 (1976) (per curiam); *Carpenters' Local Union No. 1478*, 743 F.2d at

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[1] As we said in *Carpenters' Local Union No. 1478 v. Stevens*, 743 F.2d 1271 (9th Cir. 1984), *cert. denied*, 471 U.S. 1015, 85 L. Ed. 2d 300, 105 S. Ct. 2018 (1985), "the non-union company can bid competitively on jobs that do not require union contractors, while the union company continues to bid on jobs requiring union contractors." *Id.* at 1275.

1276-77 n.7; *N.L.R.B. v. Don Burgess Constr. Corp.*, 596 F.2d 378, 386 (9th Cir.), *cert. denied*, 444 U.S. 940, 100 S. Ct. 293, 62 L.Ed.2d 306 (1979). This is because the fact that Nor-Cal and North Bay may constitute a single employer does not necessarily mean that their employees share a "community of interests" sufficient to make them a single bargaining unit. *See Don Burgess*, 596 F.2d at 386. This bargaining unit issue, which is a representational question, must be decided by the NLRB in the first instance. *See* 29 U.S.C. § 159(b) ("The Board shall decide in each case . . . [what] the unit appropriate for the purposes of collective bargaining shall be . . . ."); *Carpenters' Local Union No. 1478*, 743 F.2d at 1278; *Cappa v. Wiseman*, 659 F.2d 957, 959 (9th Cir. 1981).

Accordingly, if appellees had relied solely on the "single employer" theory, appellants would have prevailed on their primary jurisdiction argument. The district court could not have extended the collective bargaining agreement to North Bay without a prior determination by the NLRB that the employees and North Bay and Nor-Cal constituted a single bargaining unit.

But appellees bypassed the "single employer" theory and instead invoked the "alter ego" theory. To prevail on the "alter ego" theory, appellees were required not only to make the threshold showing that the two firms were a single employer, but also to prove that North Bay was being used "in a sham effort to avoid collective bargaining obligations," *Brick Masons Pension Trust v. Industrial Fence & Supply, Inc.*, 839 F.2d 1333, 1336 (9th Cir. 1988), rather than for the pursuit of legitimate business objectives untainted by "union animus," *Haley & Haley, Inc. v. NLRB*, 880 F.2d 1147, 1150 (9th Cir. 1989) (per curiam). *See also A. Dariano & Sons, Inc. v. District Council of Painters No. 33*, 869 F.2d 514, 519 (9th Cir. 1989) ("In all alter ego determinations an element of fraud or misrepresentation also exists."). It is the settled

law of our circuit that once appellees prevailed on these issues, the district court could hold that the Nor-Cal bargaining agreement covered North Bay without first getting a unit determination from the NLRB. *See, e.g., Northwest Adm'rs, Inc. v. Con Iverson Trucking, Inc.*, 749 F.2d 1338, 1340 (9th Cir. 1984); *Carpenters' Local Union No. 1478*, 743 F.2d at 1276-77 ("[A] showing [that employees of both companies constitute a single bargaining unit] is not required under the alter ego doctrine.").[2]

Relying on *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 98 appellants also assert that ERISA does not provide the district court jurisdiction to enforce a collective bargaining agreement with North Bay employees who are not signatories to the Nor-Cal labor agreement. *Advanced Lightweight Concrete* provides appellants no support, however, because the Court said ERISA provides no jurisdiction to enforce *noncontractual* obligations, specifically, an employer's obligation under the National Labor Relations Act to make pension fund contributions *post*-contract. *See id.* at 548-49. Because the case at bar concerns *contractual* obligations, namely the employer's obligation to contribute during the agreement's term, jurisdiction under ERISA was also proper.

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[2] Appellants rely on *United Ass'n of Journeymen & Apprentices, Local 342 v. Valley Eng'rs*, 975 F.2d 611 (9th Cir. 1992), to argue that the primary jurisdiction doctrine also applies in an "alter ego" case. In *Valley Engineers*, the NLRB made a determination that the two firms were neither a single employer nor alter egos. *See id.* at 613. The holding in *Valley Engineers* that the union could not collaterally attack this NLRB determination, *see id.* at 615, has no application to the case at bar because in this case, the NLRB has made no determination whatsoever.

II

Alter Ego

A

Standard of Review

On the merits, appellants claim that the grant of summary judgment on the "alter ego" theory was inappropriate. The alter ego test is, as they contend, highly fact specific. *See Local Joint Exec. Bd., Culinary Workers Union, Local 226 v. Royal Center, Inc.*, 796 F.2d 1159, 1164 (9th Cir. 1986), *cert. denied*, 479 U.S. 1033, 93 L. Ed. 2d 835, 107 S. Ct. 881 (1987); *J.M. Tanaka Constr., Inc. v. NLRB*, 675 F.2d 1029, 1033 (9th Cir. 1982). Applying the standard test for summary judgment, we review the district court's decision *de novo* to decide whether a genuine issue of material fact exists. *See Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986).

Because appellees had the burden of proof on the question of alter ego, they had the burden of establishing a prima facie case on their motion for summary judgement. *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Once they did so, it became incumbent on appellants to "set forth specific facts showing that there is a genuine issue for trial," Fed. R. Civ. P. 56(e), by evidence cognizable under that rule. Appellants' burden of contradicting appellees' evidence is not negligible. As the Supreme Court has explained, "[I]f the evidence is merely colorable or is not significantly probative summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 91 L. Ed. 2d 202, 106 S. Ct. 2505, 2511 (1986) (citation omitted).

B

Appellees' Burden

The record clearly demonstrates that appellees have borne their initial burden of establishing facts that, if left uncontroverted, would show that North Bay was the alter ego of Nor-Cal.

1

Single Employer

As explained above, the "alter ego" theory requires a threshold showing that Nor-Cal and North Bay constitute a single employer. The criteria for determining whether two firms constitute a single employer are (1) common ownership, (2) common management, (3) interrelation of operations, and (4) centralized control of labor relations. *See NLRB v. Don Burgess Constr. Corp.*, 596 F.2d 378, 384 (9th Cir.), *cert. denied*, 444 U.S. 940, 62 L. Ed. 2d 306, 100 S. Ct. 293 (1979). No one factor is controlling nor need all criteria be present. *See id.* The most important factor is centralized control of labor relations, which can be demonstrated either by showing common control of day-to-day labor matters, *see J.M. Tanaka Constr., Inc. v. NLRB*, 675 F.2d 1029, 1034 (9th Cir. 1982), or by showing that the person in charge of the union company's labor relations made the decision that the second company would be non-union, *see Don Burgess*, 596 F.2d at 385-86.

Appellees produced ample evidence that Nor-Cal and North Bay constitute a single employer. As for the first two factors - common ownership and common management - appellees have introduced evidence showing that Elmar Lee Pettit owned both Nor-Cal and North Bay, and that he managed both businesses. In sworn testimony in the Solano

County Municipal Court, Elmar Lee Pettit testified: "I own North Bay Plumbing. . . . I presently own three plumbing companies, including North Bay Plumbing." (S.E.R. Tab 8, at 3.) He has operated North Bay under three different contractor's licenses, two of which also name Audrey Pettit. But even those licenses listing Audrey Pettit as co-owner record Elmar Lee Pettit as the "Qualifying Partner or Responsible Managing Officer," which means that he certified, under penalty of perjury, that he would "exercise at all times during [his] employment such supervision and control of . . . construction operations as is necessary to secure full compliance with the provisions of Section 7068.1 [of the California Business and Professions Code] . . . ." (*See* S.E.R. Tab 55, at 13.) The licensing form that Elmar Lee Pettit signed explains that

> *supervision and control* includes any one or any combination of the following activities: supervising construction, running jobs, making installations, supervising employees, overseeing sub-contractors, checking jobs for proper workmanship, managing contracting activities or working fulltime on jobs.

(*Id.*) Moreover, sworn declarations from several former employees and customers of North Bay state that Elmar Lee Pettit exercised this kind of control over North Bay's day-to-day operations. (S.E.R. Tabs 13; 41-44; 50-53.)

As for the third factor - interrelation of operations between the two companies - appellees presented evidence to show that Nor-Cal's purchasing agent established North Bay's accounts on the strength of Nor-Cal's credit and served briefly as purchasing agent for both companies. (*See* S.E.R. Tab 16.) The two companies exchanged materials and supplies and kept a running tab without charging each other for overhead or handling. (*See* S.E.R. Tab 14, at 4-5.) And as

elaborated below, the two corporations and the Pettits commingled their finances. (*See* S.E.R. Tab 24, Exh. 21.)

Finally, as for the fourth and most important factor - centralized control of labor relations - three North Bay plumbers testified that Elmar Lee Pettit hired them, (*see* S.E.R. Tabs 41-43), and four testified that he supervised, trained, or fired them, (*see* S.E.R. Tabs 41-44). In addition to such day-to-day control over labor relations, Elmar Lee Pettit apparently made the decision that North Bay would be a non-union shop. According to affidavits submitted by appellees, Elmar Lee Pettit told associates that a non-union shop was the only way he could make any money. (*See* S.E.R. Tab 16, at 14-16; Tab 41, at ¶¶ 2, 10; Tab 42, at ¶ 6.)

2

Intent

To establish North Bay as the alter ego of Nor-Cal, appellees must not only make the threshold showing that the two firms constituted a single employer but also must show that North Bay was created in "an attempt to avoid the obligations of [Nor-Cal's] collective bargaining agreement through a sham transaction or a technical change in operations." *A. Dariano & Sons, Inc. v. District Council of Painters No. 33*, 869 F.2d 514, 518 (9th Cir. 1989). The appellees presented significant evidence of Elmar Lee Pettit's anti-union animus and his intent to avoid the collective bargaining agreement with Local 343. Evidence was presented to show that on numerous occasions he declared "I'm gonna close that fucking Union shop!" (S.E.R. Tab 42, at ¶ 6.) Further evidence was presented that he even told a customer that he had to take care to "conceal his involvement with North Bay so that he would not get caught at double breasting." (S.E.R. Tab 13, at ¶ 11.) The appellees also presented evidence that Elmar Lee Pettit used North Bay

to do work that would have been performed by Nor-Cal if North Bay had not been created. In fact, their evidence showed that several Nor-Cal projects were transferred to North Bay abruptly, in the middle of the job. (*See* S.E.R. Tab 13, at ¶¶ 8-11; Tab 14, at ¶¶ 40-43; Tab 52, at ¶ 3.) Finally, the appellees presented evidence that Nor-Cal stopped bidding on jobs and shut down its operations in 1987. (*See* S.E.R. Tab 29, at ¶¶ 8-12).

Appellants argue that this evidence is insufficient as a matter of law given that the two firms coexisted for a significant period of time. They argue that the "alter ego" theory is appropriate only in situations in which the union firm is closed and a new non-union firm is immediately opened in its place. Although the "alter ego" theory is commonly applied in successorship situations, it is not limited to this context. Indeed, some period of simultaneous operations is not uncommon even when the non-union firm is alleged to be the successor of the union firm. For example, in *Haley & Haley, Inc. v. NLRB*, 880 F.2d 1147 (9th Cir. 1989) (per curiam), a union trucker continued in business for sixteen months after its non-union alter ego successor was established. *See id.* at 1148. In this case, the period of simultaneous operation was admittedly much longer. However, by itself, simultaneous operation does not preclude a finding of alter ego.

In sum, appellees have produced substantial evidence that North Bay and Nor-Cal constituted a single employer and that Elmar Lee Pettit's purpose in establishing North Bay was to effect a technical change in operations that would enable him to continue his plumbing business while avoiding his obligations under the collective bargaining agreement with the employees of Nor-Cal. Accordingly, we hold that appellees have borne their initial burden of providing evidence that, if uncontroverted, would entitled [sic] them to prevail on the "alter ego" theory.

C

Appellants' Burden

Once the appellees have made their initial showing, the burden shifts to the appellants to show that they presented specific facts that raise a genuine issue of material fact for trial. While we hold that the appellants have failed to create a genuine issue of material fact as to whether North Bay and Nor-Cal constituted a single employer, we do hold that the appellants have produced evidence sufficient to raise such an issue with respect to Elmar Lee Pettit's intent to create and operate North Bay in an attempt to avoid the obligations of Nor-Cal's collective bargaining agreement.

1

Single Employer

Appellants argue that the marital relationship between Elmar Lee and Audrey Pettit should not create a presumption that North Bay and Nor-Cal are a single employer, which is true, but this argument ignores Elmar Lee Pettit's sworn statements that *he* owned and managed North Bay.

Appellants also argue that Dave Adams managed Nor-Cal with Elmar Lee Pettit, while North Bay had a series of managers who worked for Audrey Pettit. But the evidence they cite does not contradict appellees' evidence that Elmar Lee Pettit owned and controlled Nor-Cal and was at the same time the driving force behind North Bay. In particular, it does not contradict appellees' evidence that Elmar Lee Pettit hired, trained, and fired North Bay's employees, and that Elmar Lee Pettit made the decision that North Bay would be non-union. Nor does appellants' evidence contradict

appellees' proffer that Elmar Lee Pettit transferred Nor-Cal accounts to North Bay.

Elmar Lee Pettit does declare that "I told [customers] I could not help them, that they should call North Bay Plumbing." (C.R. 229.) But these general denials of involvement in North Bay's affairs conflict with his sworn statements on North Bay's business license that he would "supervis[e] and control" North Bay's plumbers. Such internal inconsistencies in a party's own testimony fail to create a *genuine* issue of material fact as to whether North Bay was the alter ego of Nor-Cal. *See Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975) (holding that "the necessity of choosing between the [appellants'] two conflicting versions" of a material fact does not defeat summary judgment).

2

Intent

Even though the district court correctly ruled that there was no triable issue as to whether North Bay and Nor-Cal were a single employer, we believe that the court erred in ruling that there was no material issue regarding Elmar Lee Pettit's intent. Pettit's testimony presents an alternate explanation of the reasons why North Bay was created and for the eventual demise of Nor-Cal. He states that North Bay was created at the suggestion of John Adams, who wanted to go into business with Audrey Pettit as a way of making ends meet during a strike of Nor-Cal employees. (*See* C.R. 115, at ¶ 2). Elmar Lee Pettit testified that Audrey Pettit thought starting the business was a good idea and that John Adams was the "driving power behind North Bay." (*Id*). He further testified that North Bay concentrated on residential work, while Nor-Cal did more commercial projects. (*See id.* at ¶¶ 28-30).

While the fact that North Bay coexisted with Nor-Cal for a number of years does not preclude a finding of alter ego, the continued operation of Nor-Cal after the creation of North Bay is probative of Pettit's intent in creating North Bay. Had Pettit created North Bay with the intention of diverting all of Nor-Cal's business to his new, non-union shop, one would expect to find a relatively quick decrease in Nor-Cal's business accompanied by a corresponding increase in the business of North Bay. However, Pettit testified that Nor-Cal not only continued in operation for more than five years after the creation of North Bay, but that its workforce and gross earnings increased significantly over that time period. (*See id.* at ¶ 15). He stated that employment grew from about ten men to 25-30 men and gross income increased from $688,000 to over $2,500,000. (*See id*). This evidence is sufficient to raise a genuine issue of fact, precluding summary judgment.

Finally, Elmar Lee Pettit's testimony contradicts the appellees' suggestion that Nor-Cal's demise was the result of his intentional actions designed to close down the union shop in favor of North Bay. He testified that the dramatic decline in Nor-Cal's business in 1987 resulted from union organizers talking Nor-Cal employees into quitting their jobs in protest when Pettit refused to turn North Bay into a union shop. (*See id.* at ¶¶ 26-30).

Drawing the inferences most favorable to the nonmoving party, as we are required to do on summary judgment, we hold that the appellants' evidence creates a genuine issue of material fact regarding whether Pettit created and operated North Bay with the intention of avoiding Nor-Cal's collective bargaining obligations. Therefore, we reverse the district court's summary judgment against Nor-Cal.

III

Statute of Limitations

Appellants also argue that the district court should have found the union's claims barred by the statute of limitations.[3] Actions brought under § 301 of the LMRA are governed by the relevant statute of limitations of the forum state, in this case, California's four-year period for breach of contract claims. *See* Cal. Civ. Proc. Code § 337 (West 1993); *Waggoner v. Dallaire*, 649 F.2d 1362, 1367 (9th Cir. 1981). The limitations period may be tolled, however, if appellants mislead the appellees. *See Waggoner*, 649 F.2d at 1368.

We agree with the district court that the doctrine of equitable tolling applies here. As early as December 1980, Local 343 officers suspected Elmar Lee Pettit of illegal double-breasting, but when they confronted him with their suspicions, he denied owning North Bay and explained that it was his wife's business. (*See* C.R. 58, Exh. C.) The union nevertheless lodged an unfair labor practice charge with the NLRB, and withdrew the charge only when the Board stated that it lacked sufficient evidence to support a complaint and would dismiss the charge if it were not withdrawn. (*See* S.E.R. Tab 1, at ¶¶ 5-7.) The NLRB's determination that it lacked sufficient evidence rested, in turn, on two sworn statements from Elmar Lee Pettit, in which he denied having any ownership interest in North Bay or having substantial knowledge of its operations or its interrelationship with Nor-Cal. (*See* S.E.R. Tabs 6 & 7.) Appellants offered no evidence

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[3] Appellants also argue laches, but laches is an equitable defense unavailable in actions at law governed by a statute of limitations. *See International Tel. & Tel. Corp. v. General Tel. & Elecs. Corp.*, 518 F.2d 913, 925-26 (9th Cir. 1975); *County of Los Angeles v. City of Alhambra*, 27 Cal. 3d 184, 612 P.2d 24, 31, 165 Cal. Rptr. 440 (1980).

to establish a genuine issue of fact as to whether these statements fraudulently concealed the facts from appellees.

Appellants contend that, once on notice of a potential claim, the appellees had an obligation to make a reasonable effort to investigate the facts. Specifically, they fault appellees for not enforcing an information request under their collective bargaining agreement. We reject this argument because the record shows that appellees went several times to Elmar Lee Pettit for information, both directly and through the NLRB, and were met with misleading assurances that he had nothing to do with North Bay. Where a plaintiff suspects the truth but investigates unsuccessfully, fraudulent concealment will toll the statute. *See Sears, Roebuck & Co. v. Blade*, 139 Cal. App. 2d 580, 294 P.2d 140, 146-47 (1956). Accordingly, the statute of limitations does not bar this action.

IV

Piercing the Corporate Veil

We now consider the district court's ruling that there was no genuine issue of fact material to whether the union was entitled to pierce the corporate veil of Nor-Cal and impose personal liability upon the Pettits. In deciding whether to pierce the corporate veil, we consider three factors: "[1] the amount of respect given to the separate identity of the corporation by its shareholders, [2] the degree of injustice visited on the litigants by recognition of the corporate entity, and [3] the fraudulent intent of the incorporators." *Seymour v. Hull & Moreland Eng'g*, 605 F.2d 1105, 1111 (9th Cir. 1979). Appellees must prevail on the first threshold factor and on one of the other two. *See Board of Trustees v. Valley Cabinet & Mfg. Co.*, 877 F.2d 769, 773 (9th Cir. 1989). In this case, the district court concluded that there was no genuine issue of fact as to any of the three factors and

pierced the veil. We reverse the summary judgment on the veil-piercing claim because at a minimum, there are disputed fact issues regarding both the fraud and justice factors.

First, we conclude that the district court erred in holding that it was undisputed that "[t]he evidence establishes that North Bay was formed for the purpose of defrauding the union and the trust funds." Order Granting Summary Judgment at 10. In the context of the alter ego determination, we have held that there remains a genuine issue of fact as to whether Elmar Lee Pettit intended to evade the obligations of the collective bargaining agreement.[4] The fraudulent intent element of the veil-piercing doctrine would not be satisfied, however, merely by appellees' establishment of an entitlement to summary judgment against Nor-Cal and North Bay under the alter ego doctrine. The doctrines are analytically distinct and require different factual inquiries.

The alter ego doctrine as developed in labor law is analytically different from the traditional veil-piercing doctrine as developed in corporate law. The alter ego doctrine is designed to prevent employers from escaping their collective bargaining obligations by shifting work to non-union firms they also own. This doctrine has nothing to do with the doctrine that allows creditors of corporations to pierce the corporate shell to hold shareholders liable for

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[4] Appellees also argue that the Pettits should be held personally liable as participating tortfeasors and for fraudulent misrepresentation under § 301 of the LMRA. These arguments were not addressed by the district court. However, both theories depend upon proving that the Pettits undertook to fraudulently evade their collective bargaining obligations. Since there remains a dispute regarding Elmar Lee Pettit's intent, summary judgment on these alternative grounds is also inappropriate.

corporate debts if they abuse the corporate form to defraud creditors.[5]

When unions invoke the alter ego doctrine to enforce collective bargaining obligations on behalf of their members, it is irrelevant whether or not the employers are corporations. The doctrine may be invoked regardless whether employers are corporations, partnerships, or wholly owned proprietorships. In this case, for example, appellees could have invoked the alter ego doctrine even if the Pettits were conducting their plumbing businesses as sole proprietorships rather than as corporations, and even if Nor-Cal and North Bay were financially healthy corporations.

The veil-piercing doctrine does not come into play in this case unless and until appellees establish their right to a money judgment against Nor-Cal and North Bay under the alter ego doctrine. As we said in *Seymour*, the traditional rules on piercing the corporate shell at most affect the quality of a labor organization's remedy if it finds itself with a judgment against an insolvent corporate shell. *See Seymour*, 605 F.2d at 1111.

Appellees argue, however, that other acts of undisputed fraud can support their veil piercing claim. First, they argue that the Pettits committed tax fraud by paying personal expenses out of the corporate accounts and underpaying income taxes. However, this characterization of the business records is in dispute. *See* Declaration of Sam Gallina, C.R. 119

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[5] *See Valley Cabinet*, 877 F.2d at 773 ("Garden variety fraud should be insufficient to pierce the corporate veil in the absence of evidence of shareholder abuse of the corporate form to defraud creditors.").

Second, Appellees argue that the Pettits' fraudulent concealment of the relationship between North Bay and Nor-Cal satisfies the fraud factor. However, we have held that "[g]arden variety fraud should be insufficient to pierce the corporate veil in the absence of evidence of shareholder abuse of the corporate form to defraud creditors." *Valley Cabinet*, 877 F.2d at 773. Thus, it is not enough that the Pettits committed acts of fraud during the operation of their businesses. Instead, the plaintiffs must show that the "shareholder misused the corporate form to perpetrate the[ ] fraud." *Id.* Whether the Pettits misused the corporate form to fraudulently evade the obligations of the collective bargaining agreement is in dispute. However, false statements *about* the relationship between the Pettits' corporations do not, in themselves, constitute misuse of the corporate form to perpetrate a fraud.

Thus, summary judgment on the veil-piercing issue cannot be supported under a fraud theory.[6]

However, appellees' argue that the *injustice* factor of the veil-piercing inquiry has been satisfied. They contend that not piercing the corporate veil would allow the Pettits to retain the financial rewards of their fraudulent scheme. But this presumes the truth of what is in genuine dispute - that the Pettits misused the corporate form to drain corporate assets. Appellees also claim that it would be unjust not to pierce the veil because they would not be able to recover damages otherwise. But our precedents do not recognize that the "inability to collect . . . by itself, constitute[s] an inequitable result." *Seymour*, 605 F.2d at 1113.

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[6] We have reviewed Appellees' other claims of fraud and find them to be meritless.

Viewed in a light most favorable to the Pettits, the evidence raises genuine issues of fact on both the fraud and injustice factors of the traditional veil-piercing inquiry. Accordingly, the Pettits cannot be held personally liable for the obligations of their corporations at summary judgment.

V

Punitive Damages

Because we reverse the summary judgments entered against all defendants, we necessarily vacate the award of punitive damages. We therefore do not reach the issues raised by appellants regarding availability of punitive damages as a matter of law.

CONCLUSION

The summary judgment against all defendants is VACATED. The cause is REMANDED for further proceedings consistent with this opinion.

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September 9, 1999

Ms. Cathy A. Catterson, Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Bay Area Pipe Trades Pension Trust Fund et. al. v. Nor-Cal Plumbing, Inc., et al.*
Court of Appeals Docket Nos. 96-16172, 96-16284

Dear Ms. Catterson:

I am writing pursuant to Circuit Rule 36-4, on behalf of all Appellants, to request that the "Memorandum" decision issued in the above-referenced case on July 27, 1999, be redesignated an "Opinion" and published. A petition for rehearing and for rehearing *en banc* was denied on September 7, 1999.

In their Joint Petition For Rehearing, Appellants objected to the Panel's action of designating the decision as a "non-citable" Memorandum on the basis that the Circuit lacks such authority and on the further grounds that such action violates the due process and equal protection clauses

of the United States Constitution. The purpose of this letter is to ensure that Appellants exhaust all administrative remedies, and accordingly, in this letter Appellants will not repeat the arguments set forth in their Joint Petition but rather incorporate them herein.

Additionally, and notwithstanding their objections to Circuit Rule 36, Appellants now request publication of the Memorandum on the ground that the Panel's decision clearly and unequivocally meets the publication standard set forth in the Circuit Rule. Specifically, Circuit Rule 36-2(a) provides that a decision shall be designated as an Opinion if the decision "establishes, alters, modifies or clarifies a rule of law."

The Memorandum decision meets the criteria with respect to the following holdings all of which establish new law in this Circuit:

> (1) The Panel holds that a claim for fraud under § 301 (29 U.S.C. § 185) cannot be stated against a corporate officer unless the veil piercing test is established. (Slip Memo p. 20.) This holding limits *Rozay's Transfer v. Local Freight Drivers*, 208, 850 F.2d 1321 (9th Cir. 1988) and adopts the position of the Third Circuit in *Antol v. Esposto*, 100 F.3d 1111 (3rd Cir. 1997). The holding therefore establishes new law within this Circuit.
>
> (2) The Panel holds that it is harmless error for a jury to decide an equitable issue so long as "ample evidence" supports the verdict. (Slip Memo pp. 9-10.) This holding establishes new law within this Circuit. Further, the holding conflicts with precedent established by the Fourth Circuit in *Troy v. City of Hampton*, 756 F.2d 1000 (4th Cir. 1985).

(3) The Panel approves the district court's jury instructions with respect to the labor law alter ego claim. (Slip Memo pp. 7-9.) There are no reported cases in this Circuit relating to such jury instructions, and the holding establishes new law in this Circuit.

(4) The Panel approves in part, and disapproves in part, the district court's jury instructions with respect to the veil piercing claim. (Slip Memo pp. 10-14.) There are no reported cases in this Circuit relating to such jury instructions, and the holding establishes new law in this Circuit.

(5) The Panel holds that it is proper for a trial judge to read to the jury a statement summarizing the facts described in a previous appellate decision. (Slip Memo pp. 1-2.) There are no reported cases in this Circuit relating to the summarizing of an appellate decision, and the holding establishes a new law in this Circuit.

(6) The Panel holds that the "law of the case" doctrine does not preclude relitigation of the amount of damages although a party failed to challenge, in a previous appeal, the damage award. (Slip Memo pp. 28-29.) This holding adopts the position of the Tenth circuit in *Wheeler v. John Deere Co.*, 935 F.2d 1090 (10th Cir. 1991) and establishes new law in this Circuit.

Additionally, the Memorandum decision meets the publication criteria with respect to the following holdings all of which clarify or modify the law in this Circuit:

(1) The Panel holds that it is harmless error to admit into evidence a summary which contains inadmissible hearsay where the summary was "mainly based on non-hearsay records...." (Slip Op. pp. 25-26.) This holding limits *Paddack v. Christensen*, 745 F.2d 1254 (9th Cir. 1984) and therefore constitutes with a clarification or modification of existing law.

(2) The Panel holds that the use of the corporate form to commit "tax fraud" does not satisfy the fraud prong of the veil piercing test. This holding clarifies or modifies this Circuit's holding in *U.A. Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465 (9th Cir. 1995) which seemingly allows the use of tax fraud.

(3) The Panel holds that a cross-examining party does not have the right under FRE 705 to introduce into evidence all of the data reviewed by an expert witness. (Slip Memo pp. 24-25.) This holding clarifies the scope of FRE 705 and deals with an issue never dealt with in this Circuit.

Given the number of holdings that either establish, modify, or create law in this Circuit, there can be no doubt that the Memorandum must be designated as a citable Opinion under Circuit Rule 36. Inasmuch as the Rule uses the mandatory "shall" in describing the decisions to be designated as Opinions, the Panel lacks the discretion to disregard the Rule. The Rule requires that the Memorandum be designated as an Opinion where the stated criteria are met. The failure to designate the Memorandum as an Opinion would constitute an arbitrary and capricious application of the Rule and would violate the due process and/or equal protection clauses of the United States Constitution.

Accordingly, request is hereby made that the Panel properly redesignate the Memorandum as an Opinion or state its reasons for refusing to do so.

As required by Circuit Rule 36-4, I am mailing a copy of this letter to Appellees' counsel of record, John J. Davis, Jr.

Very truly yours,

Henry F. Telfeian

cc: John J. Davis, Jr., Esq.
Todd M. Baily, Esq.
Pamela C. Jackson, Esq.
Patrick W. Jordan, Esq.
Mr. Lee Pettit